No. 85-1148

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MANUFACTURERS HANOVER TRUST COMPANY, as Executor of the Estate of CHARLOTTE C. WALLACE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision that the Internal Revenue Service's use of male-female mortality tables does not constitute sex-based discrimination in violation of the Fifth Amendment conflict with the principles set forth in such decisions of this Court as *Craig v. Boren*, 429 U.S. 190 (1976), *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) and Title VII cases such as *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) and with the Supreme Court of Indiana's decision in *Reilly v. Robertson*, 266 Ind. 29, 360 N.E.2d 171 (1977), *cert. denied*, 434 U.S. 825 (1977)? The male-female tables in this case are used to measure the lives of decedent Charlotte Wallace and her son, Howard Wallace, in order to determine the value of Mrs. Wallace's reversionary interest in a trust.

2. Does the Court of Appeals' decision that, although the use of male-female mortality tables discriminated against female decedents, the discrimination was not unconstitutional 1) because female beneficiaries might be advantaged; 2) because purported accuracy in valuing a decedent's fictional reversionary interest in a trust was an important governmental interest and 3) because the discrimination was not intentional, conflict with such cases as *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), *Weinburger v. Wiesenfeld*, 420 U.S. 636 (1975),*Craig v. Boren*, 429 U.S. 190 (1976) and cases following it?

3. Did the Court of Appeals' decision decide an important question of constitutional law regarding taxation and sex-based discrimination which should be decided by the Supreme Court?

LIST OF PARTIES

All parties to the proceeding in the Court whose judgment is sought to be reviewed are:

MANUFACTURERS HANOVER TRUST COMPANY,
as Executor of the Estate of
Charlotte C. Wallace,

Plaintiff-Appellee,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellant.

LISTING PURSUANT TO RULE 28.1

Manufacturers Hanover Corporation

(Parent Company)

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Listing Pursuant to Rule 28.1	ii
Table of Authorities	
Reference to the Opinion Below	1
Statement of Grounds of Jurisdiction	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	5
(1) The Trust Agreement Made by Mrs. Wallace	5
(2) The Computation of the Value of Mrs. Wallace's Reversionary Interest	6
(3) The Proceedings Below	8
Reasons for Granting the Writ	8
Preliminary Statement	8
I. THE HOLDING OF THE COURT OF APPEALS IS IN CONFLICT WITH THE PRINCIPLES LAID DOWN IN SUCH CASES AS *CRAIG V. BOREN*, 429 U.S. 190 (1976) AND *MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN*, 458 U.S. 718 (1982) AND IN THE TITLE VII CASES, SUCH AS *CITY OF LOS ANGELES V. MANHART*, 435 U.S. 702 (1978)	10

Page

II. THE COURT OF APPEALS' ATTEMPTS TO JUSTIFY THE DISCRIMINATION CAUSED BY THE CHALLENGED PRACTICE IS ALSO IN CONFLICT WITH SUCH CASES AS *WENGLER V. DRUGGISTS MUTUAL INSURANCE CO.*, 446 U.S. 142 (1980), *WEINBURGER V. WIESENFELD*, 420 U.S. 636 (1975) AND *CRAIG V. BOREN*, 429 U.S. 190 (1976) 16

A. The Use of Male-Female Tables Discriminates Against All Female Decedents As Compared To Similarly Situated Male Decedents 16

B. The Court Of Appeals Ignored The Principle That The Government Has The Burden Of Showing An "Exceedingly Persuasive Justification" For the Use of Male-Female Actuarial Tables 20

C. When The Challenged Practice Is Discriminatory On Its Face, A Finding Of Unconstitutionality Does Not Require That The Discrimination Is Intentional . 22

III. THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES REGARDING TAXATION AND SEX-BASED DISCRIMINATION THAT SHOULD BE DECIDED BY THE SUPREME COURT 23

CONCLUSION 24

TABLE OF AUTHORITIES

	Page
Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983)	8, 12, 23
Caban v. Mohammed, 441 U.S. 380 (1979)	10
Califano v. Goldfarb, 430 U.S. 199 (1977)	10, 18, 19
City of Los Angeles Dept. of Water & Power Manhart, 435 U.S.702 (1978)	8, 11, 13, 19, 23
Craig v. Boren, 429 U.S. 190 (1976)	10, 14, 17
EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978)	12, 23
Estate of Allen v. United States, 558 F.2d 14 (Ct. Cl. 1977)	21
Frontiero v. Richardson, 411 U.S. 677 (1973)	10, 18
Geduldig v. Aiello, 417 U.S. 484 (1974)	13, 17, 18, 19
General Electric Co. v. Gilbert, 429 U.S. 125, 133 (1976)	13, 18
Kirchberg v. Feenstra, 450 U.S. 455 (1981)	10
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	9, 10, 13, 20, 22

Page

Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). 14

Nashville Gas v. Satty, 434 U.S. 136 (1977) 13

Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669 (1983) 13, 18

Orr v. Orr, 440 U.S. 268 (1979) 10

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 9, 13, 20

Reed v. Reed, 404 U.S. 71 (1971) 10

Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171 *cert. denied*, 434 U.S. 825 (1977) 9, 13, 23

Retired Public Employees' Assoc. of Calif. v. California, 677 F.2d 733 (9th Cir 1982), *vacated and remanded*, 463 U.S. 1222 (1983). . 12

Spirt v. Teacher Insurance and Annuties Assoc., 475 F.Supp. 1298 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982); *vacated and remanded*, 463 U.S. 1223 (1983) 12, 23

Stanley v. Illinois, 405 U.S. 645 (1972) 10

Stanton v. Stanton, 421 U.S. 7 (1975) 10

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 22

	Page
Weinburger v. Wiesenfeld, 420 U.S. 636 (1975) ..	10, 16, 18, 19
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	9, 10, 13, 16, 18, 19
CONSTITUTIONAL PROVISIONS	
Fifth Amendment to the United States Constitution	2
STATUTES AND REGULATIONS	
26 U.S.C. § 7422	5
28 U.S.C. §1346(a)(1)	5
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	5
48 Fed. Reg 50087 (October 31, 1983).	8
Internal Revenue Code § 2037 (26 U.S.C. § 2037).	5
IRC § 2037	2, 5, 6, 7
IRS Revenue Ruling 66-307, 1966-2 C.B. 429	21
Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, *et seq.*	11
Treas. Reg. §20.2037-1(c)(3)	3

Page

Treas. Reg. §20.2031-1 .....

Treas. Reg. §20.2031-7 8

Treas. Reg. § 20.2031.7(a) 4, 8

Treas. Reg. §20.2031(e) 6

Treas. Reg. §20.2031(f) 6

Treas. Reg. § 20.2031-10 ..... 4, 7, 12

Treas. Reg. §20.2031-10(e) 4, 6, 7, 12

Treas. Reg. § 20.2031-10(f) 5, 6, 7

OTHER AUTHORITIES

Brilmayer, Laycock and Sullivan, *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222 (1983) 14

Brilmayer, *et al.*, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980) 15

Drs. G.H. Miller and Dean R. Gerstein, *The Life Expectancy of Nonsmoking Men and Women*, *PUBLIC HEALTH REP* (July-August 1983) ... 15

Gender-Based Mortality Tables and the Code: An Equal Protection Analysis, 33 U. FLA. L. REV. 122 (1980) 15

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reference to the Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit and the dissenting opinion of Judge Newman are officially reported at 775 F.2d 459. The order of the United States Court of Appeals for the Second Circuit dated October 22, 1985, denying Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc is not reported. The District Court's opinion is reported at 576 F. Supp. 837. The opinions of the Second Circuit and the District Court, the Second Circuit's Order on the Petition for Rehearing and memorandum of the District Court denying the government's motion for reargument are set out in the Appendix at A 1, A 38, A 52 and A 53, respectively.

Statement of Grounds of Jurisdiction

(i) The judgment sought to be reviewed was entered on September 16, 1985.

(ii) Petitioner's Petition for Rehearing and Suggestion For Rehearing In Banc was denied on October 22, 1985. This Petition is filed within ninety days of that denial.

(iii) Not applicable.

(iv) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes and Regulations Involved

The Fifth Amendment provides:

> No person shall be deprived of life, liberty, or property, without due process of law .....

IRC § 2037 provides:

> (a) GENERAL RULE. – The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if -
>
> (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and
>
> (2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

(b) SPECIAL RULES. – For purposes of this section, the term "reversionary interest" includes a possibility that property transferred by the decedent -

(1) may return to him or his estate, or

(2) may be subject to a power of disposition by him,

but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary. In determining the value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. Notwithstanding the foregoing, an interest so transferred shall not be included in the decedent's gross estate under this section if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a general power of appointment (as defined in section 2041) which in fact was exercisable immediately before the decedent's death.

Treas. Reg. §20.2037-1(c)(3) provides in pertinent part:

> For purposes of this section, the value of the decedent's reversionary interest is computed as of the moment immediately before his death, without regard to whether or not the executor elects the alternate valuation

> method under section 2032 and without regard to the fact of the decedent's death. The value is ascertained in accordance with recognized valuation principles for determining the value for estate tax purposes of future or conditional interests in property . . . .

Treas. Reg. §20.2031-7(a) provides that for "estates of decedents dying after December 31, 1970, the fair market value of...reversions is their present value determined under §20.2031-10."

Treasury Regulation § 20.2031-10(e) states, in pertinent part:

> (e) *Actuarial computations by the Internal Revenue Service.* If the valuation of the interest involved is dependent upon the continuation or the termination of more than one life or upon a term certain concurrent with one or more lives, a special factor must be used. The factor is to be computed on the basis of interest at the rate of 6 percent a year, compounded annually, and life contingencies determined, as to each male and female life involved, from the values of 1x that are set forth in columns 2 and 3, respectively, of Table LN of paragraph (f). Table LN contains values of lx taken from the life table for total males and the life table for total females appearing as Tables 2 and 3, respectively, in *United States Life Tables: 1959-61*, published by the Department of Health, Education, and Welfare, Public Health Service, except that for technical reasons Table LN employs graduated data, furnished by that Department, to increase the number of significant figures shown at ages of male lives older than 86 and female lives older

> than 90. Many such special factors may be found in, or computed with the use of the tables contained in, the publications entitled "Actuarial Values I: Valuation of Last Survivor Charitable Remainders" and "Actuarial Values II: Factors at 6 Percent Involving One and Two Lives."... However, if a special factor is required in the case of an actual decedent, the Commissioner will furnish the factor to the executor upon request. The request must be accompanied by a statement of the sex and date of birth of each person, the duration of whose life may affect the value of the interest, and by copies of the relevant instruments.

Treas. Reg. § 20-2031-10(f) sets forth actuarial tables that are based on male-female mortality data.

Effective December 1, 1983, the Internal Revenue service reverted to the use of non-gender-based tables as it had used from 1949 through 1970.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 26 U.S.C. § 7422 (civil actions for recovery of any internal revenue tax), 28 U.S.C. § 1331 (jurisdiction of all civil actions arising under the Constitution or the laws of the United States) and 28 U.S.C. §1346(a)(1) (jurisdiction over any civil action against the United States for the recovery of any internal-revenue tax).

(1) *The Trust Agreement Made by Mrs. Wallace*

Decedent Charlotte C. Wallace was the grantor of a Trust from which she received the net income for her life. Upon her death, the income was to be paid to her son, Howard C. Wallace. Mrs. Wallace retained a reversionary interest in the Trust, within the meaning of the Internal Revenue Code § 2037 (26 U.S.C. § 2037). (A 3 - A 4, A 39)

Mrs. Wallace died on February 28, 1976, at the age of 88 years. She was survived by her son, Howard, who was 57 years

old at the time of his mother's death. (A 3) Accordingly, she never realized her reversionary interest.

(2) *The Computation of the Value of Mrs. Wallace's Reversionary Interest*

Under IRC § 2037, if a reversionary interest in a trust exceeds 5% of the value of the trust immediately before decedent's death, the date of death value of the trust is includable in the gross estate of the decedent. The arbitrary 5% limitation was adopted in 1949 to avoid taxation of transferred property in which decedent holds a *de minimis* reversionary interest. In order to value the reversionary interest, two lives must be measured – the life of the decedent and the life of the surviving income beneficiary (here, Mrs. Wallace and her son, Howard, respectively). (A 3 - A 4, A 12)

The Estate (petitioner) computed the value of Mrs. Wallace's reversionary interest on the basis of Unisex Table 1 of the United States Life Tables (1959.61 published by the U.S. Department of Health, Education and Welfare) ("Unisex Table 1"). The computation resulted in a valuation of 4.9867% for her reversion. The Estate, accordingly, did not include the Trust in Mrs. Wallace's gross estate and paid a federal estate tax of $86,280.32. (A 4, A 49)

Respondent computed the value of Mrs. Wallace's reversionary interest in the Trust using the male-female tables contained in Table LN of Treasury Regulation § 20.2031-10(e) and (f). The use of these tables resulted in a valuation of Mrs. Wallace's reversion in excess of 5% and, therefore, defendant included the Trust in Mrs. Wallace's gross estate. Based on that calculation, the defendant assessed deficiencies in the amount of $455,581.71, which the Estate paid. The Estate then commenced this action seeking a refund, with interest. (A 4, A 49)

Treasury Regulation §20.2031(e) and (f) reflects an actuarial assumption that women live longer than men in every case. (Actually, however, only 20% of women live longer than men.)

(A 6, A 45) Therefore, the value of a reversionary interest always will be greater for a woman, and her estate is more likely to be taxed. (A 6 - A 7)

This is shown by the following table:

Sex and Age of Decedent	Sex and Age of Surviving Life Beneficiary	Present Value of Reversionary Interest Based on Sex Discriminating Tables in Regulation §20.2031-10(f)
Female age 88	Male age 57	.06654
Male age 88	Male age 57	.06415
Female age 88	Female age 57	.03520
Male age 88	Female age 57	.03390

(A 7, A 27)

Had Howard Wallace been a female, the trust would not have been includable in the Estate. (A 7 - A 8) Furthermore, assuming a 31 year age disparity, as there is in this case, between a decedent and a male beneficiary, all female decedents between ages 69 to 74 are taxable under IRC §2037 and Treasury Regulation §20.2031-10 but no male decedent between age 69 and 74 is taxable. Thus, taxability turns on decedent's sex.

The choice of sex, therefore – only one of many traits involved in life expectancy – results in the estates of women being taxed more frequently under the 5% rule than the estates of men, where all facts other than sex are identical (e.g., birthdates of the measuring lives, the date of death of the decedent, the date of creation of the trust, etc.)

On the other hand, by using Unisex Table l, the sex of the persons whose lives are being measured does not determine taxability. (A 47)

Prior to 1970, the Treasury used unisex tables to determine the value of a decedent's reversionary interest. In 1970, the Treasury adopted the gender-based tables used in Mrs. Wallace's case. On October 31, 1983 (two weeks after the District Court's opinion), the Treasury promulgated proposed regulations (which are now in effect) applicable to decedents dying after November 30, 1983, requiring – once again – the use of unisex actuarial tables to value reversions. *See* Treas. Reg. § 20.2031.7(a), 48 Fed. Reg. 50087 (October 31, 1983).

(3) *The Proceedings Below*

The Estate filed its complaint on February 5, 1982. After issue was joined, the parties filed cross-motions for summary judgment. On October 17, 1983, the District Court granted Manufacturers Hanover's motion and denied the government's cross-motion. 576 F. Supp. 837. (A 38) The government's motion for reargument was denied, on November 29, 1983. (A 53)

On appeal, the Court of Appeals reversed. 775 F.2d 459. (A 1) Judge Newman wrote a dissenting opinion. (A 21-A 37) The Estate's Petition for Rehearing and Suggestion for Rehearing In Banc were denied on October 22, 1985. (A 52)

REASONS FOR GRANTING THE WRIT

Preliminary Statement

The challenged practice discriminates against female decedents because they are more likely to be taxed than similarly situated male decedents. Despite this Court's condemnation in *Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) and *City of Los Angeles Dept. of Water & Power Manhart*, 435

U S 702 (1978) – both Title VII cases – of gender-based mortality tables, the Court of Appeals refused to hold that the discrimination here was unconstitutional. *See also Reilly v. Robertson*, 266 Ind. 29, 360 N.E.2d 171 (1977), *cert. denied*, 434 U.S. 825 (1977) in which the Supreme Court of Indiana held that the use of sex-based actuarial tables – in an annuity context – violated the equal protection guarantees of the 14th Amendment.

Although the Court of Appeals found that the challenged practice discriminated against female decedents, it held that the practice might benefit some female beneficiaries and, therefore, the practice was not unconstitutional. This is irrelevant. The challenged practice is directed at female decedents, not beneficiaries. The relevant classification, therefore, is female decedents. The Court's failure to recognize the appropriate classification is in conflict with *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); and *Craig v. Boren*, 429 U.S. 190 (1976).

Furthermore, the Court of Appeals accepted, without any substantial discussion, the government's claim that the accurate valuation of reversions was an important governmental objective, notwithstanding the government's present use of unisex actuarial tables. The Court, therefore, did not require that the government meet its burden of showing "an exceedingly persuasive justification" for the discriminatory practice. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976). This is in conflict with the cited cases. The Court of Appeals also held that the discrimination must be intentional before it would found to be unconstitutional. There is no such requirement, however, when, as here, the challenged practice is discriminatory on its face.

The instant case presents an opportunity to resolve important constitutional issues concerning sex-based discrimination in a taxation context. Accordingly, the Court should grant this petition.

POINT I

THE HOLDING OF THE COURT OF APPEALS IS IN CONFLICT WITH THE PRINCIPLES LAID DOWN IN SUCH CASES AS *CRAIG V. BOREN*, 429 U.S. 190 (1976) AND *MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN*, 458 U.S. 718 (1982) AND IN THE TITLE VII CASES, SUCH AS *CITY OF LOS ANGELES V. MANHART*, 435 U.S. 702 (1978)

The Court of Appeal's decision is in conflict with the principles set forth in this Court's decisions in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 728 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 149 (1980), and *Craig v. Boren*, 429 U.S. 190 (1976). Indeed in case after case, this Court has found sex-based discriminations unconstitutional. *See e.g. Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinburger v. Wiesenfeld*, 420 U.S. 636 (1975); *Orr v. Orr*, 440 U.S. 268 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

In *Craig v. Boren, supra*, 429 U.S. at 204, this Court stated that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." In *Craig*, the Court firmly established the heightened scrutiny test to be applied to sex-based discriminations: "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. This test was established to insure that classifications that rely on gender as a "proxy for other, more germane bases of classification" are not upheld. *Craig v. Boren*, 429 U.S. at 198.

The use of sex-based actuarial tables discriminates on its face on the basis of sex. In addition, the Title VII cases establish that

the use of gender-based actuarial tables discriminate on the basis of sex.

In *City of Los Angeles v. Manhart*, *supra*, 435 U.S. 702, women employees of the Los Angeles Department of Water and Power were required to make greater wage contributions than men to the annuity portion of the employees' retirement fund. The Court rejected the City's purported justification that female employees on the average live longer than male employees and held that the use of sex discriminating actuarial tables was unlawful under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, *et seq.*

The Court reasoned that the generalization that women as a class live longer than men was overbroad and unfair to an individual to whom it does not apply:

> Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics.
>
> 435 U.S. at 708.

The Court came down squarely on the side of individual characteristics: "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U.S. at 708.

The Court also discussed the possible different interpretations of male-female tables:

> Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. The generalization involved in this case illustrates the point. Separate mortality tables are easily interpreted as reflecting innate

differences between the sexes; but a significant part of the longevity differential may be explained by the social fact that men are heavier smokers than women.

435 U.S. at 709-710.

The Court also rejected the City's argument that any discrimination was on the basis of longevity, not sex:

> one cannot "say that an actuarial distinction 'based entirely on sex is based on any other factor than sex.' Sex is exactly what it is based on." 553 F.2d 581, 588 ([9th Cir.] 1976).

435 U.S. at 712-713. *See also*, *Arizona Governing Committee v. Norris*, *supra*, 463 U.S. 1073 (1983) (Payouts from employer's pension plans must be equal for men and women), *Spirt v. Teachers Insurance and Annuities Assoc.*, 475 F. Supp. 1298 (S.D.N.Y 1979), *aff'd in part and rev'd in part*. 691 F.2d 1054 (2d Cir 1982), *vacated and remanded*, 463 U.S. 1223 (1983); *Retired Public Employees' Assoc. of Calif. v. California*, 677 F.2d 733 (9th Cir 1982), *vacated and remanded*, 463 U.S. 1223 (1983); *EEOC v. Colby College*, 589 F.2d 1139 (lst Cir. 1978).

In the Title VII cases, the Court chose individual rights over group rights. In the instant case, the Fifth Amendment also requires that individual rights be recognized over group characteristics: "No *person* shall be deprived of life, liberty or property, without due process of law . . . ." Accordingly, the use of sex-based tables cannot be countenanced.

Both the Title VII cases and this case involve the use of sex-based tables to place heavier financial burdens on women because some women outlive some men; and, both the Title VII cases and the Fifth Amendment focus on the rights of individuals. The Title VII cases are, therefore, directly relevant to the issues in this case, and compel a finding that the use of the sex discriminating tables mandated by Treasury Regulation § 20.2031-10 discriminates on the basis of sex. The government, therefore, must show an "exceedingly persuasive justification"

for this discrimination. *Mississippi University for Women v. Hogan*, *supra*, 458 U.S. at 724 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 [1979]). (See Point II below.)

The Court of Appeals stated that *Manhart* was not dispositive, but ignored the statements of this Court that recognize the close relationship between a finding of discrimination in an equal protection case and such a finding in the Title VII cases. In *General Electric v. Gilbert*, 429 U.S. 125, 133 (1976) - a Title VII case - this Court held that the rationale of *Geduldig v. Aiello*, 417 U.S. 484 (1974) - an equal protection sex discrimination case - was applicable, particularly in defining the term "discrimination ." *See also*, *Nashville Gas v. Satty*, 434 U.S. 136, 148 fn. 2 (1977), concurring opinion of Mr. Justice Powell. And, in *Newport News Shipbuilding & Drydock Co. v. EEOC*, 462 U.S. 669, 684 (1983), a Title VII case construing the Pregnancy Discrimination Act, the Court cited *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) - an equal protection case - for the proposition that "discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees."

The use of sex discriminating actuarial tables has also been held to violate equal protection guarantees under the 14th Amendment. In *Reilly v. Robertson*, *supra*, 266 Ind. 29, 360 N.E.2d 171, the Trustees of the State Teachers' Retirement Fund attempted to justify the use of sex discriminating tables on the ground that such tables promoted the objectives of the Fund in assuring its financial security, *i.e.*, avoiding overpayment of benefits. For many years prior to 1972, when sex discriminating tables were introduced, Indiana used a mortality table which ignored sex. In the words of the Indiana Supreme Court, the trial court concluded

> that it was arbitrary and without rational basis for the fund to classify annuitants by sex, and based this conclusion upon, among others, the reasons that sex is only one of innumerable factors influencing life

> expectancy and other such factors are ignored; that group [illegible] statistics ignore the traits of the individual [illegible]; that 82.9% of females will have the same year of death as 82.9% of the males and as a consequence those females will die having received less than those males; and that the additional income given retired males monthly will permit them to live in retirement more comfortably than retired females.
>
> 360 N.E.2d at 176.

The Indiana Supreme Court affirmed. Although noting that the United States Supreme Court in *Craig v. Boren*, *supra*, had adopted an even stricter level of scrutiny for sex-based classifications, the Indiana Supreme Court found no need to look beyond the "traditional 'rational basis' low level scrutiny" in order to find a Constitutional violation. 360 N.E.2d at 175, n.1. *See also Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

Greater longevity for women is only a group statistical observation. The condition of "greater longevity" for women as a class is not a biological necessity in any individual case.* In fact, for approximately 80% of women, the overbroad generalization concerning their greater longevity is untrue. Only 20% of women live longer than men, yet, under the challenged practice, every woman is more likely to be taxed than similarly situated men. Many other critical factors, however, such as race, geographical environment, smoking and drinking habits, marital status, and high stress related working environments unquestionably play a major part in either an individual's or a subgroup's life expectancy. *See*, Brilmayer, *et al.*, *The Efficient*

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* *See* Brilmayer, Laycock and Sullivan, *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222 (1983) ("Research has shown that it is difficult, if not impossible, to determine the relative magnitude of any biological component of [the sex mortality differential]. The researchers who conclude that there is a biological component believe it to be small. . . ." 50 U. CHI L. REV at 236. (citations omitted)).

Use of Group Average as Nondiscrimination: A Rejoinder to Professor Benston, 50 U. CHI. L. REV. 222 (1983); Brilmayer, *et al.*, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); *see also Gender-Based Mortality Tables and the Code: An Equal Protection Analysis*, 33 FLA. L. REV 122 (1980). *See, also*, Drs. G.H. Miller and Dean R. Gerstein, *The Life Expectancy of Nonsmoking Men and Women*, *PUBLIC HEALTH REP* (July-August 1983). The assumptions of the female actuarial tables, therefore, are based on an unfair, stereotypical belief that women live in the home, raise children and never venture into the "man's world" of business, public affairs and the like.

POINT II

THE COURT OF APPEALS' ATTEMPTS TO JUSTIFY THE DISCRIMINATION CAUSED BY THE CHALLENGED PRACTICE IS ALSO IN CONFLICT WITH SUCH CASES AS *WENGLER V. DRUGGISTS MUTUAL INSURANCE CO.*, 446 U.S. 142 (1980), *WEINBURGER V. WIESENFELD*, 420 U.S. 636 (1975) AND *CRAIG V. BOREN*, 429 U.S. 190 (1976)

A. *The Use Of Male-Female Tables Discriminates Against All Female Decedents As Compared To Similarly Situated Male Decedents.*

Although the Court of Appeals found the "IRS practice of using gender-based mortality tables ... constitutes discrimination based on gender" (A 8) and that use of male-female tables "places female decedents in worse positions than similarly situated male decedents", it held that female decedents were only "one subclass of directly affected women" and that "[f]emale beneficiaries are also directly affected, and the IRS practice actually benefits them, in comparison to similarly situated men." (A 14) The Court of Appeals clearly misapprehended the classification at issue. The relevant classification here is female decedents. Since the Court of Appeals found that the challenged practice discriminated against female decedents on the basis of gender and since all females will die, all females are discriminated against. Accordingly, female decedents are not merely a subclass of females.

The discrimination against female decedents is not justified by suggesting that female beneficiaries may be benefited by the challenged practice, as apparently held by the Court of Appeals. The challenged practice is directed at decedents; *i.e.*, it is a tax on decedents' estates. Any impact of the challenged practice on beneficiaries is indirect and, in any event, irrelevant. Female decedents, as compared to similarly situated male decedents, are the only class directly discriminated against by the use of gender-based tables. Women's estates are more likely to be

diminished than similarly situated men's estates. The appropriate comparison, therefore, is between female decedents and similarly situated male decedents, not between female decedents and female beneficiaries. (A 27 - A 28) As Judge Newman stated in his dissent:

> Moreover, even if female beneficiaries sometimes fare better under gender-distinct tables (as in those instances when they happen to be included among the legatees who benefit from reduced estate taxes), that consequence does not eliminate the valid complaint of all female settlors that their gender always results in a higher valuation of the reversionary interest than would occur if these settlors had been males. The focus of an inquiry into whether a gender discrimination adversely affects all class members must be confined to the similarly situated members of that gender. A civil service scoring system that reduces the test scores of all female candidates by five points would not be saved by a proviso that the daughter of any applicant would be entitled to a five-point bonus. (A 37).

Geduldig v. Aiello, *supra*, 417 U.S. 484 relied on by the Court of Appeals, preceded *Craig v. Boren*, 429 U.S. 190 (1976). *Craig v. Boren* firmly established the heightened scrutiny given to gender-based discriminations that is the law today, *i.e.*, a gender-based classification must further a legitimate and important governmental objective and there must be a direct and substantial relationship between the objective and the means employed.

In *Geduldig*, the Supreme Court applied a rational interest test, a lower test than that which is now required in gender-based cases. See 417 U.S. at 495-496. The Court found that the statute at issue did not discriminate against women because only disabilities related to pregnancy were excluded from the benefits of the statute. The classification had to do with the "underinclusiveness of the set of risks that the State has selected to

insure". 417 U.S. at 494. In the case at bar, the issue is not one of limiting a social benefit because of "underinclusiveness"; the issue is one of imposing taxes on the basis of gender through the use of overinclusive, overbroad gender-based actuarial tables.

Decisions later than *Geduldig* establish that the gender discrimination in the instant case is unconstitutional and call into question whether *Geduldig* is still valid.

In *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 at 682-683, fn. 22 (1983), this Court noted:

> Consistently since 1970 the EEOC has considered it unlawful under Title VII for an employer to provide different insurance coverage for spouses of male and female employees. [citations omitted]
>
> Similarly, in our Equal Protection Clause cases we have repeatedly held that, if the spouses of female employees receive less favorable treatment in the provision of benefits, the practice discriminates not only against the spouses but also against the female employees on the basis of sex. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (opinion of BRENNAN, J.) (increased quarters allowances and medical and dental benefits); *id.*, at 691 (POWELL, J., concurring in judgment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (Social Security benefits for surviving spouses); see also *id.*, at 654-655 (POWELL, J., concurring); *Califano v. Goldfarb*, 430 U.S. 199, 207-208 (1977) (opinion of BRENNAN, J.) (Social Security benefits for surviving spouses); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 147 (1980) (workers' compensation death benefits for surviving spouses).

Furthermore, by rejecting the analysis of *General Electric v. Gilbert*, 429 U.S. 125 (1976), the Court, at least by implication,

called into question the rationale of *Geduldig*. *See e.g.* 462 U.S. at 684. *See also*, concurring opinion of Mr. Justice Blackmun in *Manhart*, 435 U.S. at 724-725.

In *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 147 (1980), discussed by both the majority and the dissent below, the Supreme Court found that "it [was] apparent that the [challenged] statute discriminates against both men and women." Male wage earners received an advantage over similarly situated female wage earners because male wage earners were assured that their spouses would get full compensation benefits. On the other hand, widows received an advantage over similarly situated widowers. (See A 27 - A 28) Notwithstanding, the Court struck down the challenged statute because the only purported justification for "the double-edged discrimination" was administrative convenience. 446 U.S. at 150-152. *See, also, Califano v. Goldfarb, supra*, 430 U.S. 199; *Weinberger v. Wiesenfeld, supra*, 420 U.S. 636.

Likewise, here, the fact that female beneficiaries may receive a secondary advantage is irrelevant to the appropriate comparison between female decedents and similarly situated male decedents. Nor does the use of a second sex-based mortality table for beneficiaries erase the constitutional deficiencies of the use of sex-based tables for either the decedent or the beneficiary.

The Court of Appeals also held that there is nothing to show that "the challenged IRS practice places a greater aggregate estate tax burden on the class of all women than on the class of all men." (A 16) It stands to reason, however, that if female decedents are more likely to have to pay a higher estate tax than similarly situated male decedents, then female decedents unfairly have a greater aggregate estate tax burden imposed on them. Indeed, the Court of Appeals found that under the gender-based tables, "similarly situated men and women are treated differently in a way that may effect the tax-payer's ultimate tax burden." (A 8)

B. *The Court of Appeals Ignored The Principle That The Government Has The Burden of Showing An "Exceedingly Persuasive Justification" For The Use Of Male-Female Actuarial Tables*

The Court of Appeals ignored the requirement that it is the government's "burden of showing an 'exceedingly persuasive justification' " for the discriminatory practice, and, thus, is in conflict with the decisions that establish that well-accepted rule. *Mississippi University for Women v. Hogan*, *supra*, 458 U.S. at 724 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 [1979]). Since the challenged practice does in fact discriminate on the basis of gender, as the Court of Appeals found (A 8, A 14), it is the government's burden to justify that discrimination. The Court of Appeals simply notes, however, that the "government claims that its objective in using gender-based mortality tables is accuracy in valuing reversionary interests, and that this increased accuracy promotes equality and fairness in imposing tax burdens" and accepts the government's claim because the record "presents no reason to doubt that the challenged practice actually was adopted with the intention of promoting that objective." (A 11 - A 12) Clearly, the Court of Appeals was in conflict with the decisions of this Court in simply accepting the government's claim without the "exceedingly persuasive justification" required for gender-based classifications.

There is no governmental objective served in, nor even a rational basis for, distinguishing between males and females, for purposes of valuing a reversionary interest to meet the arbitrary *de minimis* 5% test, especially when one measuring life has already expired. (A 31 - A 34) As Judge Newman noted: "It is difficult to see what important governmental objective is being substantially advanced by using a gender-based discrimination to place a theoretical value on a reversionary interest whose actual value is almost always zero." (A 33)

The government's recent re-adoption of unisex tables establishes beyond any doubt that the alleged accuracy provided

by male-female tables is not an important governmental objective or, if so, that the government has abandoned that objective.

Moreover, Congress has never sanctioned the use of gender-based tables in these circumstances and, in fact, unisex tables were used for more than twenty years after Congress adopted the 5% test. Furthermore, such concerns as the decedent's health, smoking, eating and drinking habits and the like are not considered. *Estate of Allen v. United States*, 558 F.2d 14 (Ct. Cl. 1977); IRS Revenue Ruling 66-307, 1966-2 C.B. 429. Thus, there is no basis for selecting sex and making taxability depend on that one factor.

In the *Manhart* line of cases, since women, as an actuarial group, live longer than men, there was at least an arguable need, from an actuarial point of view, to take into account the differences in longevity so that the pension plan would receive enough payments into the plan to pay benefits from the plan. No such need even arguably exists in valuing a reversionary interest. The actuarial factor is computed only for purposes of determining whether the value of the reversionary interest meets the arbitrary 5% *de minimis* test. Congress could just as easily have chosen a 10% or 20% *de minimis* test. Having chosen an arbitrary test figure, however, it makes no sense for defendant to now apply only one actuarial group trait (other than age) — sex.

Indeed, even if accuracy were a legitimate important objective, gender-based tables are not more accurate. Since only 20% of women live longer than men; greater accuracy can be achieved by ignoring the gender of the decedent and the beneficiary and using unisex tables.

C. *When The Challenged Practice Is Discriminatory On Its Face, A Finding Of Unconstitutionality Does Not Require That The Discrimination Is Intentional*

The Court of Appeals held that there must be proof that the discrimination based on sex was intentional, citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252 (1977). This is, again, in conflict with such decisions as *Mississippi University for Women v. Hogan*, *supra* and *Craig v. Boren*, *supra*, which have no such requirement.

Village of Arlington Heights was a race discrimination case that dealt with a statute that was racially neutral on its face. The Court held that because the challenged practice was non-discriminatory on its face, actual discrimination must be shown, along with an intent on the part of the legislature to discriminate, before the facially neutral statute could be declared unconstitutional. In *Arlington Heights*, there was no proof that the facially neutral scheme was intended to discriminate on the basis of race. *See also*, *Personnel Administrator of Massachusetts v. Feeney*, *supra*, 442 U.S. 256.

The requirement of intentional discrimination, therefore, would apply, if at all, only when the challenged practice is neutral on its face. It bears no relationship to the case at hand. Here, the use of separate gender-based actuarial tables is discriminatory on its face, a point which the Court of Appeals clearly recognized. (A 5 - A 10) Accordingly, there is no requirement that the gender-based discrimination in this case be intentional to support a finding of unconstitutionality.

POINT III

THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES REGARDING TAXATION AND SEX-BASED DISCRIMINATION THAT SHOULD BE DECIDED BY THE SUPREME COURT

It is submitted, based on the arguments above, that even if the Court of Appeals' decision were not in conflict with the decisions of this Court, this case presents an important constitutional issue which should be decided by the Supreme Court.

Gender-based tables have been the subject of many cases such as *City of Los Angeles v. Manhart*, *supra*; *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, *supra*; *Spirt v. Teacher Insurance and Annuties Assoc.*, 475 F.Supp. 1298 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded*, 463 U.S. 1223 (1983); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) and *Reilly v. Robertson*, *supra*. All of these cases have ruled against their use. The fairness of the taxing statutes and regulations is just as important and far reaching as the use of gender-based tables in the annuity context. The Court should, therefore, grant this petition to consider the constitutionality of sex discriminatory practices in the taxation context.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
January 3, 1986

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1334 — August Term, 1983

(Argued: June 15, 1984 Decided: September 16, 1985)

Docket No. 84-6051

MANUFACTURERS HANOVER TRUST COMPANY, as EXECUTOR OF THE ESTATE OF CHARLOTTE C. WALLACE,

Plaintiff-Appellee,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, NEWMAN, and PRATT, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York, Charles E. Stewart, Jr., *Judge*, invalidating on equal protection grounds the use of gender-based mortality tables to calculate, for estate tax purposes, the value of a reversionary interest in a trust.

Reversed. Judge Newman dissents in a separate opinion.

DENNY CHIN, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney, Thomas D. Warren, Assistant United States Attorney, New York, NY, of Counsel), *for Defendant-Appellant.*

ROBERT E. CROTTY, New York, New York (Harvey F. Zimand, Richard J. Concannon, Debra M. Aaron, Kelley Drye & Warren, New York, NY, of Counsel), *for Plaintiff-Appellee.*

Isabelle Katz Pinzler, Mary L. Heen, Burt Neuborne, American Civil Liberties Union Foundation, New York, NY, Steven Shapiro, New York Civil Liberties Union, New York, NY, submitted a brief *for amici curiae* American Civil Liberties Union, New York Civil Liberties Union, NOW Legal Defense and Education Fund, and Women's Legal Defense Fund.

PRATT, *Circuit Judge*:

The question presented in this appeal by the United States from the summary judgment in *Manufacturers Hanover Trust Co.* v. *United States*, 576 F. Supp. 837 (S.D.N.Y. 1983), Charles E. Stewart, *Judge*, is whether the Internal Revenue Service's use of gender-based mortality tables to value reversionary interests of a decedent's estate under 26 U.S.C. § 2037 violates the equal protection guaranteed by the due process clause of the fifth amendment. The IRS, following regulations in effect from 1970 to 1983, used gender-based mortality tables to calculate the estate tax owed by plaintiff Manufacturers Hanover Trust Company, as executor of the estate of Charlotte C. Wallace. The district court held that the IRS practice was unconstitutional, and it therefore awarded plaintiff a tax refund of $455,581.71 plus interest.

We reverse. Although the challenged IRS practice did distinguish between males and females, the gender classification was substantially related to the important governmental objective of promoting equity and fairness in estate taxes by accurately valuing reversionary interests. The challenged practice lacks those characteristics that make gender classifications invidious. There is no evidence that the challenged practice distributes burdens or benefits in a way that disadvantages the class of women as a whole, or that disadvantages the class of men as a whole. The gender classification does not demean the ability or social status either of women or of men, and it is not based on assumptions that women or men will choose stereotyped or traditional social roles. The gender-based mortality tables realistically reflect the fact that men and women have different average life expectancies, and the government's use of these averages for determining values in estate taxation does not create an unacceptable risk of discriminating against those who are not within the statistical norm. In light of all these circumstances, there is nothing unconstitutional about the challenged practice.

BACKGROUND

On November 5, 1923, Charlotte C. Wallace established a trust that provided income to her for her life and, on her death, income to her son, Howard. The corpus of the trust would pass by the terms of Howard's will if he outlived his mother, but by the terms of Charlotte's will if he predeceased her. Charlotte died on February 28, 1976, at the age of 88; she was survived by Howard, who was then 57 years old. The estate tax law provides that if the value of a decedent's reversionary interest in a trust immediately before death exceeds 5 percent of the

trust's value, then the trust corpus must be included in the gross estate. 26 U.S.C. § 2037(a)(2) (1982).

Charlotte's executor calculated the value of her reversionary interest at 4.9867 percent, using Unisex Table 1 of the *United States Life Tables: 1959-61*, published by what was then known as the United States Department of Health, Education and Welfare. Because the value fell below the statutory 5 percent cutoff, the estate paid no tax on the trust corpus.

The Treasury regulations in effect at the time of Charlotte's death, however, required the value of a reversionary interest in a trust to be computed according to gender-based mortality tables. *See* Treas. Reg. §§ 20.2031-7(a), 20.2031-10(d), (e), (f), 20.2037-1(c)(3); Rev. Rul. 66-307, 1966-2 Cum. Bull. 429. Using gender-based tables, IRS calculated the value of the reversionary interest at 6.654 percent and assessed the estate with an aggregate deficiency, plus additions, of $458,662.98.

The estate paid the deficiency and, after an administrative claim for a refund was denied, filed this refund suit. The district court granted the estate's motion for summary judgment, 576 F. Supp. 837 (S.D. N.Y. 1983), holding that use of gender-based mortality tables violated the equal protection component of the fifth amendment. This appeal followed.

Discussion

"Statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig* v. *Boren*, 429 U.S.

190, 197 (1976) (quoting *Reed* v. *Reed*, 404 U.S. 71, 75 (1971)). "To withstand constitutional challenge * * * classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives." *Craig* v. *Boren* at 197. In the present case the government argues, first, that tne challenged statutory scheme does not treat men and women differently, and second, that even if the statutory scheme does treat men and women differently, the differences in treatment are justified and not invidious. We find the arguments supporting the first point to be unpersuasive, but on the second point we agree with the government that there is nothing invidious or unjustified in the way this particular statutory scheme makes use of distinctions between men and women.

A. *Are similarly situated men and women treated differently because of classification by gender?*

The government argues that the IRS practice does not treat men and women differently because "[u]nder the 5 percent rule of section 2037, the estates of decedents of both sexes are includable, and trusts established for the benefit of members of both sexes are taxable. The key is not the grantor's or the grantee's sex, but the value of the grantor's reversionary interest."

This argument is unconvincing. While it is true that estates of both male and female decedents are includable under the rule, and that trusts may be taxed whether their beneficiaries are men or women, nevertheless, what the government calls the "key" of section 2037 —the value of the grantor's reversionary interest—is determined by calculations that treat similarly situated men and women differently. As a result the amount of

the estate tax will sometimes depend upon whether the decedent or beneficiary is male or female. This comes about in the following way

For purposes of the estate tax, the value of the grantor's reversionary interest in a trust requires calculating the probability that a person at the age of the grantor, just prior to death, would outlive the trust's beneficiary. The figures on life expectancies come from standard mortality tables, and gender-based tables reflect the undisputed fact that, on the average, women live longer than men at every age. This statistical fact then affects the calculation of a reversionary interest in two ways.

First, when gender-based tables are used, the likelihood that a female trust settlor will outlive her beneficiary is greater than the likelihood that a male trust settlor in similar circumstances will outlive his beneficiary. (Similar circumstances, for present purposes, occur when the male trust settlor's beneficiary is the same age and gender as the female trust settlor's beneficiary.) Therefore, when gender-based tables are used in calculating the estate tax, the fact that the decedent is female will increase the value of the reversionary interest over what that value would be if the decedent were male.

A second effect of using gender-based tables comes from the role played by the life expectancy of the beneficiary. When gender-based mortality tables are used, the likelihood that a female beneficiary will outlive her trust settlor is greater than the likelihood that a male beneficiary in similar circumstances will outlive his trust settlor. (Similar circumstances occur here when the male beneficiary's trust settlor is the same age and gender as the female beneficiary's trust settlor). When

gender-based tables are used, therefore, the fact that the beneficiary is female will decrease the value of the reversionary interest from what it would be if the beneficiary were male.

It is therefore possible that in certain circumstances the sex of the decedent or of the beneficiary will determine whether or not the value of the reversionary interest exceeds the 5 percent of the trust corpus that requires the trust to be included as part of the gross taxable estate. The effect of using gender-based tables is illustrated in the following table, which shows the percent to be used for calculating the value of a reversionary interest in a trust created by a person who died at Charlotte's age with a beneficiary at Howard's age.

Decedent Age 88	Beneficiary Age 57	Percent Resulting From Gender-Based Tables
Female	Male	6.654
Male	Male	6.415
Female	Female	3.520
Male	Female	3.390

The table demonstrates that whatever the sex of the beneficiary, the value of a reversionary interest is greater for a female *decedent* (6.654% with male beneficiary and 3.520% with female beneficiary) than for a similarly situated male decedent (6.415% for male beneficiary and 3.390% for female beneficiary). Similarly, whatever the sex of the decedent, the value of a reversionary interest is less with a female *beneficiary* (3.390% with male decedent and 3.520% with female decedent) than with a similarly situated male beneficiary (6.415% with male decedent and 6.654% with female decedent). The table also shows that if Howard had been female instead of male, the trust would not have been included in the taxable estate be-

cause the value of the reversionary interest would have been 3.520 percent of the trust corpus.

It is apparent, therefore, that under the IRS practice of using gender-based mortality tables, similarly situated men and women are treated differently in a way that may affect the tax-payer's ultimate tax burden. This constitutes discrimination based on gender.

In arguing against this conclusion, the government claims that the challenged regulations do not discriminate because "the tax here is assessed against an estate, a legal fiction that is separate and distinct from the decedent and that lacks any gender. It is a tax not on an individual * * * ". However, the mere fact that the taxed entity is an estate does not make it impossible for that tax to discriminate against men or women. The estate represents the legal interests of the decedent and the decedent's beneficiaries, who may be individual men or women. When an estate pays a tax, there is an obvious practical impact on the beneficiaries: the higher the tax, the less the estate has to distribute to the beneficiaries. There is also an impact on the decedent, since the higher the estate tax the less the decedent can benefit, through her estate, those she wishes to benefit. Estates and the laws governing them are a means of channeling effects upon individuals, and taxes on estates are just as capable, in principle, of discriminating against men or women as a tax on individuals. On a substantive level, therefore, there is no difficulty in challenging an estate tax on the ground that it discriminates against men or women. As for standing, perhaps the challenge cannot be brought except by an executor of the estate suing after death has occurred and the controversy concerning the allegedly discriminatory tax has ripened, but there can be no doubt

that this is the type of contention that may be advanced by an executor. *Cf. NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

The government also argues that in the present case the challenged regulations cannot be found to discriminate on the basis of gender because the corpus of Charlotte's trust would have been includable in the estate even if she had been male. As the table given above shows, if Charlotte had been male the value of her reversionary interest would have been 6.415 percent, and since that value is above the 5 percent statutory cut-off, the trust would still have been included as part of the taxable estate. This shows, the government claims, that in this case there is no dissimilar treatment that could count as discrimination.

The reasoning here is flawed in two ways. First, the argument ignores the beneficiary. The gender classifications that affect the estate tax involve Howard as well as Charlotte. If Howard had been female instead of male, the value of the reversionary interest would have been less than 5 percent and therefore not taxable, regardless of the sex of the decedent. The estate can thus claim injury because of the dissimilar treatment of male and female beneficiaries.

The second flaw in the government's argument is that it ignores the consequence in this case of the IRS practice of using gender-based mortality tables instead of gender-neutral tables. If a gender-neutral table were used to calculate the value of Charlotte's reversionary interest her estate would not have to pay the contested tax. For a decedent age 88 and a beneficiary age 57, the

value of a decedent's reversionary interest, calculated by gender-neutral tables, would be 4.9867 percent of the trust corpus no matter what the sex of the decedent or beneficiary. Thus, the basic IRS decision to treat men and women differently by using gender-based mortality tables directly burdens the estate in a way it would not be burdened if the IRS had ignored gender.

In short, it does not matter that the challenged practice calculates the reversionary interest at greater than 5 percent of the trust whether Charlotte was male or female, because the practice still treats men and women differently, and the basic decision to use a system that takes gender into account, rather than one which does not, demonstrably burdens this estate.

B. *Is the gender classification invidious?*

Classifications distinguishing between males and females are justified under the constitution if they are substantially related to important governmental objectives. *Craig* v. *Boren*, 429 U.S. at 197. This test imposes a lower standard than the "strict scrutiny" test used for classifications such as race, which requires that a classification be "necessary" to further a "compelling" government interest, but it imposes a higher standard than the minimal rationality test traditionally required for legislative classifications not involving either gender or an "inherently suspect" categorization. *See Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, 468-69 (1981); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913, 926 n.57 (1983).

Contrary to the government's position, we do not apply the minimal rationality standard just because the

case involves federal estate taxation. To support its claim that the standard should be one of minimal rationality, the government cites primarily equal protection challenges to tax regulations that did not involve gender discrimination. *E.g.*, *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983); *Madden* v. *Kentucky*, 309 U.S. 83 (1940); *Burke Mountain Academy, Inc.* v. *United States*, 715 F.2d 779 (2d Cir. 1983). We find this authority unpersuasive.

Neither are we persuaded by *Kahn* v. *Shevin*, 416 U.S. 351 (1974), to accept the government's position on the correct standard of review. *Kahn* involved an equal protection challenge to a state law giving a property tax exemption to widows but not to widowers, and the Court's opinion does say that "[a] state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class * * * if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution." *Id.* at 355 (quoting *Allied Stores* v. *Bowers*, 358 U.S. 522, 528 (1959)). But *Kahn* also held that the challenged law was justified because it had "a fair and substantial relation to the object of the legislation", *Kahn* at 355 (quoting *Reed* v. *Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)), and the Court took great care to show the importance of the law's objective of remedying past gender discrimination. This suggests that the standard applied in *Kahn* is no different than the general standard the Court has applied in subsequent cases, such as *Craig* v. *Boren*, 429 U.S. 190 (1976), which requires that the classification by gender be substantially related to an important governmental objective.

In the present case the government claims that its objective in using gender-based mortality tables is ac-

curacy in valuing reversionary interests, and that this increased accuracy promotes equity and fairness in imposing tax burdens. We agree that this is an important governmental objective, and the record before us presents no reason to doubt that the challenged practice actually was adopted with the intention of promoting that objective, and without intent to discriminate against either men or women.

When the federal estate tax was first enacted in 1916, all property subject to a transfer "intended to take effect in possession or enjoyment at or after [the transferor's] death" was includable in the transferor's gross estate. Internal Revenue Code of 1916, § 202(b), ch. 463, 39 Stat. 778 (1916). This rule was taken to its extreme in *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701 (1949), when the Supreme Court included a $1,140,000 trust in the settlor's gross estate even though the value of the settlor's reversionary interest was approximately $70. In response, Congress enacted what has been codified as 26 U.S.C. § 2037(a), which embodies the policy judgment that when the value of a reversionary interest falls below 5 percent of a trust, it is not sufficiently significant to require that the trust be included in the gross estate for tax purposes. *See* 1949 U.S. Code Cong. Serv., 81st Cong., 1st Sess., 2171, 2185.

The use of gender-based tables to calculate the value of reversionary interests was adopted in 1970 "in the interest of greater actuarial accuracy." Memorandum accompanying notice of proposed change to male-female tables, June 11, 1970, from Randolph Thrower, IRS Commissioner, to Edwin S. Cohen, Asst. Sec. of the Treas. (available in Memos file of Fedtax library of Lexis under the search term "LR 1719"). The rationale was that

gender-based tables provide a more accurate measure of average life expectancies, and that the more accurate the measure of those averages, the fairer and more equitable the tax impositions.

Since we find no fault with the objective of the challenged practice, its constitutionality turns on whether that practice is "substantially related" to that objective. While there is no mechanical test for determining whether or not a practice satisfies the substantial relationship test, case law does make it clear that at least four particular matters must be explored and weighed: (1) aggregate impact on class; (2) demeaning generalizations; (3) stereotyped assumptions; and (4) flawed use of statistics. Consideration of these four factors in the present case convinces us that there is nothing invidious about the IRS's use of gender-based mortality tables for purposes of § 2037(a).

1. *Aggregate impact on class.*

In deciding whether the substantial relationship test is satisfied, it is relevant whether the classification disadvantages all members of a particular sex, or whether it distributes benefits and burdens to both sexes equally. In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), the Supreme Court rejected a claim of gender discrimination because the class of those benefitting from the challenged statute included both women and men, so that "[t]he fiscal and actuarial benefits of the [challenged] program thus accrue to members of both sexes". *Id.* at 496-97 n.20. The statute challenged in *Geduldig* arguably involved gender classification because it excluded pregnancy from a list of compensable disabilities. The Court upheld the statute, however, because "the aggregate risk protection" pro-

vided by the statutory disability program did not disadvantage the class of all women as compared to the class of all men. *Id.* at 496-97. When discrimination on the basis of gender has been found to violate the constitution, it has always been the case that the directly affected women (or men) as a class were disadvantaged.

In the present case, there has been no showing that the challenged practice disadvantages the class of all directly affected women as compared to the class of all directly affected men. In some situations the IRS practice places a directly affected woman in a worse position than a similarly situated man, but at other times the practice places a directly affected woman in a better position than a similarly situated man. Moreover, nothing indicates that the overall distribution of comparative advantages and disadvantages favors one sex over the other.

The challenged practice places female decedents in worse positions than similarly situated male decedents because the value of the reversionary interest will be greater when the decedent is female than when the decedent is male, both in the case where the beneficiary is male and in the case where the beneficiary is female. This shows that at least one subclass of directly affected women—female decedents—may be burdened in a special way by the IRS practice. But it does not show that the class of women as a whole is burdened any differently from the class of men, because female decedents are not the only women directly affected by the IRS practice. Female beneficiaries are also directly affected, and the IRS practice actually benefits them, in comparison to similarly situated men. The value of the reversionary interest when the beneficiary is female is always lower

than the value when the beneficiary is male, as the table set out earlier illustrates. Thus the IRS practice places female beneficiaries in better positions than male beneficiaries.

This kind of patchwork distribution of relative advantages and disadvantages is not the common pattern found in gender discrimination suits, and by itself it does not show unconstitutional discrimination. The Supreme Court did find in one case, *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), that a challenged practice unconstitutionally discriminated against both men and women. The law held unconstitutional in *Wengler* provided that workers' compensation death benefits would be paid to a widow regardless of whether she could prove actual dependence on her husband's earnings, but that a widower would receive death benefits only if he proved actual dependence on his wife's earnings or was incapacitated from wage earning. The law directly affected both widows and widowers, and widowers were directly burdened in a way that similarly situated widows were not. Any discriminatory burden suffered by women was, therefore, only the consequence of the direct burden placed in the first instance on their husbands; that direct burden, moreover, was placed on all husbands, and there was no subclass of men who received any direct advantage from the challenged practice. The effects of the law rejected in *Wengler*, therefore, are unlike the effects of the tax law at issue in the case now before us.

A law which distributes direct benefits and burdens to both men and women might still be troubling if that distribution were not equal, so that one sex would be unduly favored at the expense of the other. In the present case, however, there is simply no evidence of such in-

equality, since there is nothing to show either that the challenged IRS practice places a greater aggregate estate tax burden on the class of all women than on the class of all men, or that it places a greater aggregate burden on the class of all men than on the class of all women.

2. *Demeaning generalizations.*

Distribution of burdens or benefits which otherwise appear equal might still be objectionable because they are based on classifications which demean the ability or social status of men or of women. A legislature "is not free to make overboard generalizations based on sex * * * which demean the ability or social status of the affected class." *Parham* v. *Hughes*, 441 U.S. 347, 354 (1979). However, this is not a concern in the present case.

3. *Stereotyped assumptions.*

Under the Supreme Court decisions of the early 1970's which first established gender discrimination as a part of constitutional law, *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Weinberger* v. *Weisenfeld*, 420 U.S. 636 (1975); and *Stanton* v. *Stanton*, 421 U.S. 7 (1975), it is significant if the gender classification is based on stereotyped or traditional assumptions about social roles. Arguments that women or men "naturally" incline towards, or are "naturally" suited for, "traditional" social roles, are flawed because of their self-fulfilling character. The classifications themselves often discourage the very experimentation with social roles that would prove the traditional assumptions to be wrong. As with demeaning generalizations, however, this kind of classic discrimination is not at issue in the present case.

4. *Flawed use of statistics.*

Satisfying the substantial relationship test will prove difficult to the extent that the gender classification is based on statistical generalizations that are unreliable, that show only weak correlations, or that are flawed in other ways. In *Craig* v. *Boren*, 429 U.S. 190, for example, shortcomings in statistics required the invalidation of an Oklahoma law which prohibited men from drinking 3.2 percent beer until the age of 21, but which allowed women to drink 3.2 percent beer at age 18. The statistics offered in support of the difference in treatment of men and women showed that only .18 percent of females who were 18 to 20 years old were arrested for alcohol-related driving offenses, whereas 2 percent of males age 18 to 20 were arrested for those offenses. *Id.* at 201. A roadside random survey also found a blood alcohol concentration greater than .01 percent in 14.6 percent of males and 11.5 percent of females. *Id.* at 203 n.16. The Supreme Court rejected the state's defense, holding that a correlation of 2 percent between drinking and driving "must be considered an unduly tenuous 'fit' ", *id.* at 202, and that the roadside survey disparities between the sexes were not substantial. *Id.* at 203 n.16.

In contesting the significance of gender-based mortality statistics, appellee in the present case points to the fact that, for a group of males and females chosen at random, more than 80% of all the female deaths could be matched with the deaths of males of the same age. *See* Bergman & Gray, *Equality in Retirement Benefits*, Civ. Rights Dig., Fall 1975, at 25. It was this fact, apparently, that led Judge Stewart to say in this case that "only 20% of all women actually do outlive men", 576 F. Supp. at 842, and to conclude, therefore, that gender-

based mortality tables could not be used because their use results in discrimination against those who do not fit the statistical norm. His reasoning was that the equal protection component of the fifth amendment is concerned with individual rights, and that those who do not fit a statistical norm based on gender should not have their individual situations measured by gender-based group averages or composites.

This reasoning has an initial plausibility because of its similarity, or apparent similarity, to the reasoning used by the Supreme Court in *City of Los Angeles, Dep't of Water* v. *Manhart*, 435 U.S. 702 (1978). In *Manhart* a city department had required its female employees to make monthly payments to its pension fund which were 14.84% higher than the monthly payments required of male employees. The city department justified this practice by claiming that gender-based mortality tables showed that women lived longer than men, and that women would therefore receive, on the average, more in retirement benefits than men would. The Supreme Court held that Title VII of the 1964 civil rights act prohibited this use of gender-based statistics because it results in discrimination against individual women who do not fit the statistical norm. "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708. "Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII." *Id.* at 710.

The reasoning of *Manhart*, however, is not dispositive of the issue in the present case for three reasons. First, Title VII's standard is not the same as the standard set by the equal protection component of the fifth amendment.

Title VII gives sex discrimination the same level of scrutiny it gives to race discrimination; the statutory language forbidding sex discrimination and race discrimination is the same, except for a few differences in defenses and a separate section on pregnancy. The constitution, however, imposes only an intermediate level of scrutiny for sex discrimination, while requiring that race discrimination be subject to strict scrutiny. *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, 468-69 (1981). Proving a violation of Title VII's prohibition on discrimination does not require proving that the discrimination was intentional; proving a violation of the constitutional prohibition against discrimination does require proving that the discrimination was intentional. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). For these reasons, it cannot be assumed that every form of gender classification forbidden by Title VII is also forbidden by the constitution.

Second, in *Manhart* every directly affected woman was burdened by the challenged practice. In the present case, as explained above, some women are benefitted by the challenged practice, as compared to similarly situated men, and there has been no showing that the class of women as a whole is subject to a burden any different from the burden placed on the class of men as a whole.

Third, the relationship in *Manhart* between gender-based statistics and predictions of individual life expectancy is not the same as that relationship in the present case. In *Manhart* the justification for requiring higher payments from any individual woman was that she, as an individual, had an expectation of living longer than a man at the same age, and that she therefore had

an expectation of receiving a larger aggregate of benefits over the course of her pension years. In the present case the IRS is not using gender-based statistics to establish that the individual settlor has an actual expectation of outliving his or her beneficiary. When the estate tax becomes an issue the settlor is already dead. In a great number of cases, moreover, the actual life expectancy of the trust settlor just prior to death will be close to zero. Indeed, if the tax code were concerned with the actual market value of individual reversionary interests as measured by the individual's actual situation, rather than a theoretical value as measured by some statistical average, then the reversionary interest would rarely be included in a decedent's gross estate.

The estate tax is concerned, in fact, with something different. The goal of the estate tax in this matter is a fair and accurate determination of a special kind of average value of reversionary interests. Congress, through its statutes and the regulations implementing them, has determined that a fair way of valuing reversionary interests after a decedent's death is to use the average life expectancies of settlors and beneficiaries. It chose to reject individualized determinations, and aimed instead at making the tax burden fair across groups of settlors and beneficiaries. We cannot say that this choice to look to averages, rather than to individual situations or to some actual market for individual reversionary interests, is illegitimate.

The statistical "fit" that matters in this case, then, is accuracy of averages. In this special situation where there has been a legitimate choice to define value in terms of average life expectancies, rather than in terms of the best individualized approximation of a particular person's

actual life expectancy, there is a great deal to be said for using gender-based mortality tables because they do, in fact, give more accurate averages of life expectancies than do gender-neutral tables. Our conclusion is that this case does not present the same kind of danger of unjustified discrimination against individuals as was found in *Manhart*. The estate tax's use of the more accurate averages in gender-based tables does not discriminate against individuals.

CONCLUSION

Given the special set of circumstances present in this case, we think that the increased accuracy of gender-based tables constitutionally justifies their use. The challenged practice distributes comparative benefits to both men and women, and distributes comparative burdens to both men and women. There has been no showing of any disparate impact on the class of women as a whole, or on the class of men as a whole. The classifications do not demean either gender, and they are not based on stereotyped assumptions about the social roles men or women might choose. Finally, the method of valuing reversionary interests for tax purposes focuses, with constitutional legitimacy, on averages, and gender-based mortality tables do provide more accurate averages. We find nothing unconstitutional in the challenged practice.

We therefore reverse.

JON O. NEWMAN, *Circuit Judge*, dissenting:

This appeal presents an apparently novel equal protection issue in the area of gender discrimination. The

issue is whether the use of gender-based mortality tables to value reversionary interests for estate tax purposes denies female decedents the equal protection of the laws. The Government seeks to uphold this use of gender-distinct tables on two grounds: The tables do not discriminate on the basis of gender and, even if they do, the discrimination is not unconstitutional. I agree with the majority, though for different reasons, that the first argument is unavailing, but I respectfully dissent because I conclude that the second argument also fails. Both contentions merit extended discussion.

I.

Is There Gender Discrimination?

The Government contends that there has been no gender discrimination against the female decedent. There are two aspects to this contention. First, the Government points out that if the decedent had been a male, her estate would still have been liable for tax upon the trust corpus. Second, the Government argues that whether a trust is includable in a decedent's estate depends on a variety of factors—the age of the decedent at death, the age of the beneficiary at the decedent's death, the gender of the decedent, and the gender of the beneficiary. Recognizing that there is "some reliance on male-female mortality data," the Government maintains that there is "no disparate treatment of groups on the basis of that data" and "no classification or creation of groups solely identifiable by sex." Brief for Appellant at 15.

Before considering these specific arguments, I acknowledge my agreement with a basic premise that underlies each of them—a government practice does not con-

stitute gender discrimination unless it burdens a class identified solely on the basis of gender. That premise was at the core of the Supreme Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), rejecting a gender-discrimination challenge to a state's exclusion of pregnancy from coverage under a disability insurance program:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Id. at 496-97 n.20. *See Personnel Administrator* v. *Feeney*, 442 U.S. 256, 271-74 (1979); *Parham* v. *Hughes*, 441 U.S. 347, 352-57 (1979). Successful equal protection challenges based on gender discrimination have involved practices that burdened a class identified solely by gender. *E.g.*, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982); *Craig* v. *Boren*, 429 U.S. 190 (1976).

A. *The effect on the decedent.* The present value of the decedent's reversionary interest in the trust just prior to her death, calculated on the basis of gender-distinct mortality tables, was 6.654% of the trust corpus. If the decedent had been a male, the present value of the reversionary interest, calculated in the same way, would have been 6.415% of the trust corpus. The Government argues that since both percentages are greater than the 5% threshold figure at which a trust corpus is includable in the decedent's gross estate, there has been no gender dis-

crimination against Charlotte Wallace; her trust was not included in her gross estate because of her gender.

That argument carries the premise of *Geduldig* far beyond its legitimate scope. It is one thing to say, as the Court did in *Geduldig*, that a practice constitutes a gender-based discrimination only when it disadvantages a class identified solely on the basis of gender. It is quite another thing to say, as the Government urges here, that a challenged practice does not disadvantage a class identified solely on the basis of gender because some members of the class, including the decedent, are not *sufficiently* disadvantaged to suffer adverse consequences at the precise level at which the Government has elected to attach such consequences. In some cases, the absence of adverse consequences may defeat standing for a particular plaintiff, but it does not show the absence of a gender-based discrimination. For example, if a government employer awarded five extra points to all males who took a civil service examination and hired all persons who passed, that practice would be a gender-based discrimination against females, regardless of what score the employer selected as a passing grade.

The challenged practice in this case—use of gender-distinct mortality tables—produces a disadvantage to a class identified solely on the basis of gender: The reversionary interest of every female decedent is valued higher than the reversionary interest of every similarly situated male.[1] Since the higher the present value of the reversionary interest, the more likely that the trust will be included in the decedent's gross estate and therefore

[1] For purposes of this case, a male and a female decedent are similarly situated if they are the same age and the beneficiaries of their trusts are of the same age and gender.

taxed, the existence of the 5% dividing line does not defeat the claim of gender-based discrimination. Nor is standing defeated in this case by the fact that, with gender-distinct tabes in use, the decedent's trust would have been included in her gross estate even if she had been a male. Her executor is presenting the claim that the Government has violated equal protection requirements by using gender-distinct mortality tables instead of a unisex table. Since the decedent's trust would not have been included in her gross estate if a unisex table had been used, the executor plainly has standing to make this claim.

B. *The effect on the class of female decedents.* Determining whether the use of gender-distinct mortality tables is a gender-based discrimination against the class of female decedents is complicated by the formula for calculating the present value of a decedent's reversionary interest. The formula calls for calculation of the probability that a person at the age of the decedent, just prior to death, will outlive the beneficiary of the decedent's trust. The present value of the reversionary interest is thus a function of the life expectancies of both the decedent and the beneficiary of the trust, estimated on the basis of their ages just prior to the decedent's death. Though it is undisputed that women as a class live *on the average* longer than men as a class, the use of gender-distinct mortality tables reflecting this statistical fact has conflicting effects upon the calculation of the present value of a reversionary interest because of the following circumstances. The ages and consequent life expectancies of both the decedent and the beneficiary affect that value. Whatever increases the predicted life expectancy of the trust settlor *increases* the likelihood that the settlor will outlive the beneficiary; on the other hand, whatever in-

creases the predicted life expectancy of the beneficiary *decreases* the likelihood that the settlor will outlive the beneficiary. Gender-based tables yield higher life expectancies for females than for males at every age. Therefore, when such tables are used, the female gender of the *decedent* increases the present value of the reversionary interest, but the female gender of the *beneficiary* decreases the present value of that interest.

The situation is further complicated when one compares the outcome under gender-based tables with the outcome under a unisex table. Female decedents with *male* beneficiaries of their trusts will have their reversionary interests valued higher under gender-based tables than under a unisex table and thus will be more likely to have the trusts included in their gross estates. However, female decedents with *female* beneficiaries of their trusts will normally have their reversionary interests valued lower under gender-based tables than under a unisex table and thus will be less likely to have the trusts included in their gross estates.[2] The Government contends that this assortment of results[3] undercuts the claim that the IRS regulations discriminate on the basis of gender.

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[2] In those infrequent instances where the beneficiary is older than the decedent (and both are female), the reversionary interest of the decedent will be valued lower under a unisex table than under gender-based tables. For an older female beneficiary, the switch to a unisex table yields a lesser reduction in the life expectancy of a younger female decedent, thereby decreasing the likelihood that a person of the decedent's age would have survived the beneficiary.

[3] The variety of possible results is illustrated in the following table, which shows the percent to be used for calculating the present value of a reversionary interest of a trust created by a person who died at Charlotte's age with a beneficiary at Howard's age:

[Footnote continued on following page]

It is clear that female decedents are not uniformly worse off when gender-based tables are used than when a unisex table is used for calculating the present value of a reversionary interest. However, it is also true that the present value of the reversionary interest of every decedent, calculated under gender-distinct tables, is *always* higher when the decedent is a female than when the decedent is a male. These two facts require consideration of the issue, rarely presented in discrimination cases, whether the pertinent comparison for equal protection purposes is between the treatment of a class under the challenged practice and the treatment of that class under a neutral practice, or between the treatment of a class

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Decedent	*Beneficiary*	*Percent Resulting From Gender-Distinct Tables*
Female aged 88	Male aged 57	6.654%
Male aged 88	Male aged 57	6.415%
Female aged 88	Female aged 57	3.520%
Male aged 88	Female aged 57	3.390%

Decedent	*Beneficiary*	*Percent Resulting From Unisex Table*
Female aged 88	Male aged 57	4.9867%
Male aged 88	Male aged 57	4.9867%
Female aged 88	Female aged 57	4.9867%
Male aged 88	Female aged 57	4.9867%

The table illustrates the comparisons noted in the text. Under gender-based tables, the present value percentage is always higher for a female decedent than for a similarly situated male decedent (6.654% versus 6.415%; 3.520% versus 3.390%). Under such tables, the present value percentage is always lower when the beneficiary is female than when the beneficiary is male (3.520% versus 6.654%; 3.390% versus 6.415%). The present value percentage is always higher for a female decedent with a male beneficiary under gender-based tables than under a unisex table (6.654% versus 4.9867%). The present value percentage is always lower for a female decedent with a younger female beneficiary under gender-based tables than under a unisex table (3.520% versus 4.9867%).

under the challenged practice and the treatment of all others similarly situated under the challenged practice. This issue normally does not arise in discrimination cases because a gender-based practice that disadvantages women compared to men will usually also disadvantage women compared to how they would fare under a neutral rule.[4]

Once the analytical issue is clearly in focus, its resolution is clear. For purposes of equal protection analysis, the pertinent inquiry in determining whether a discrimination exists is whether members of a protected class are disadvantaged by the challenged practice compared to similarly situated non-members of the class. Decisions of the Supreme Court have implicitly adopted this view, even though the precise choice we face was not explicitly posed. In *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), for instance, the Court invalidated on equal protection grounds a Missouri law that denied a *widower* workers' compensation death benefits on his *wife's* work-related death, unless he either was mentally or physically incapacitated or proved dependence on his wife's earnings, but granted a *widow* death benefits without her having to prove dependence on her *husband's* earnings. The Court recognized that "the statute discriminates against both men and women." *Id.* at 147. It discriminated against widowers vis-a-vis similarly situated widows and discriminated against

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[4] This case is distinctive, if not unique, because the effects of the gender-based mortality tables enter the calculation of the present value of the reversionary interest twice—once in estimating the life expectancy of the decedent, just before death, and again in estimating the life expectancy of the beneficiary, and because those gender-based effects are augmented or diminished depending on the combination of genders of the two persons involved. When decedents and beneficiaries are of the same gender, the effects tend to cancel each other out; when the genders are different, the effects are amplified.

female wage earners vis-a-vis similarly situated male wage earners. The Court did not reject the equal protection claim simply because under the discriminatory law, some women (widows) fared better while others (wage earners) fared worse than they would have fared under a gender-neutral law. The relevant inquiry was how women fared compared to similarly situated men. *See also Califano* v. *Goldfarb*, 430 U.S. 199, 208 (1977); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 651-53 (1975).

Since the use of gender-distinct tables causes the present value of the reversionary interests of all female decedents to be higher than the present value of the reversionary interests of all similarly situated male decedents and therefore increases the likelihood that the trusts created by female decedents will be included in their gross estates and consequently taxed, the use of these tables is a discrimination based on gender. Whether that discrimination is unconstitutional under the Equal Protection Clause is a different issue, to which I now turn.

II.

Is the Discrimination Unconstitutional?

To withstand constitutional challenge under the equal protection component of either the Fifth or Fourteenth Amendments, regulations that discriminate on the basis of gender must be "substantially related" to the promotion of "important governmental objectives." *Craig* v. *Boren*, *supra*, 429 U.S. at 197.[5] In this case the Government has

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[5] The Government argues that, despite the fact that the regulations requiring gender-distinct tables discriminate against women,

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the burden of demonstrating that the regulations requiring use of gender-based tables in implementing section 2037 meet this standard, for, as the Supreme Court has stated, "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi University for Women* v. *Hogan, supra*, 458 U.S. at 724 (quoting *Personnel Administrator* v. *Feeney, supra*, 442 U.S. at 273).

The Government contends that the "important governmental objective" it seeks to promote by the use of gender-distinct mortality tables is actuarial accuracy in valuing reversionary interests of decedents' trusts. It is the achievement of that objective to which the use of gender-distinct tables must be "substantially related." Since "[a]s a class, women live longer than men," *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 704 (1978), there is a surface plausibility to the Government's contention that use of gender-distinct tables is sufficiently related to the objective of promoting ac-

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they should be subjected only to "minimal scrutiny" because they are tax regulations. In support of this contention, the Government cites primarily equal protection challenges to tax regulations that did not involve gender discrimination. *E.g., Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983); *Madden* v. *Kentucky*, 309 U.S. 83 (1940); *Burke Mountain Academy, Inc.* v. *United States*, 715 F.2d 779 (2d Cir. 1983). This authority is unpersuasive. Even *Kahn* v. *Shevin*, 416 U.S. U.S. 351 (1974), which involved gender discrimination, is not dispositive. Unlike *Kahn*, federalism does not require deference to state tax policy in the instant case, and, unlike the statute in *Kahn*, the Treasury regulations at issue here do not employ gender discrimination in order to correct the effects of past gender discrimination. There is no reason to exempt tax regulations from the standard of scrutiny applicable in all other gender discrimination cases.

tuarial accuracy to justify the gender-based discrimination inherent in such use. Analysis of the Government's contention, however, demonstrates that the requisite justification for using gender-distinct tables is not present in the limited context illustrated by this litigation—the valuation of the reversionary interest of a decedent's trust.

In the first place, it should be noted that the valuation for which gender-distinct tables are used in implementing the 5% cutoff of section 2037 differs significantly from most other purposes for which such tables are used. Typically gender-distinct tables are used to determine the amount of dollars that women as a class and men as a class should pay (or have paid for them by their employer) in order to fund some benefit such as a pension. In that context, the average life expectancies of those in each class determine the amount of dollars that need to be collected to fund the benefit. Whether or not separate calculations of life expectancies for a class of male beneficiaries and a class of female beneficiaries promote sufficient accuracy, beyond what would be achieved by a unisex table, to justify a gender-based discrimination, the calculations in that context at least determine the valuation of something real—the amount of money needed to fund the benefit. The cost of providing future benefits for a class of females is higher than the cost of promoting the same level of periodic benefits for a class of similarly situated males because the class of females will receive the benefits for a longer period of time. That is the argument that *economically* justifies a higher dollar payment for females than for males, *see* Kimball, *Reverse Sex Discrimination:* Manhart, 1979 Am. B. Found. Res. J. 83, 106, whether or not the threshold decision to price the cost of coverage

for males and females separately is sound social policy or is consistent with legal requirements, *see Los Angeles Department of Water and Power* v. *Manhart*, *supra* (pricing employment benefits higher for females than for males violates Title VII of the Civil Rights Act of 1964).

By contrast, the valuation for which gender-distinct tables are used under section 2037 does not concern anything of reality, but instead concerns only a theoretical construct. When section 2037 focuses attention on the present value of a decedent's reversionary interest in a trust the moment before death, the statute is not concerned with the actual fair market value of that interest. In most cases (all in which the decedent succumbs to a last illness) the actual market value of such an interest will be virtually zero. *See Estate of Allen*, 558 F.2d 14, 21 (Ct. Cl. 1977) (Nichols, J., concurring). Unless a decedent dies from sudden and totally unanticipated causes, his realistic life expectancy just prior to death, as distinguished from the average life expectancy of all persons of his age, is too brief to give any real value to his reversionary interest. Moreover, the present value just prior to death is calculated only for those persons who die, a circumstance that eliminates even a theoretical present value for their reversionary interest. The Government recognizes this circumstance:

> In all cases where IRC § 2037 comes into play, the grantor has in fact predeceased the beneficiary. In reality, therefore, the decedent's reversionary interest in a Section 2037 situation has no real value, since reversion can no longer occur. What IRC § 2037 does is provide for the valuation of the reversionary interest hypothetically—without regard to the fact of the decedent's death.

Appellant's Brief at 34. What is being measured in this case is the theoretical value of an interest that the Government concedes has no value in reality. It is difficult to see what important governmental objective is being substantially advanced by using a gender-based discrimination to place a theoretical value on a reversionary interest whose actual value is almost always zero.

I recognize, of course, that Congress had a legitimate reason for wanting the I.R.S. to determine the theoretical value of a reversionary interest just prior to a decedent's death. The reason is tax equity. Prior to the enactment of section 2037, a trust was included in the gross estate no matter how remote the likelihood that the corpus would ever have reverted to the decedent during his lifetime. *See Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707 (1949). Congress adopted the 5% cutoff rule of section 2037 to prevent taxation of trusts in which the interest of the decedent, just prior to death, valued on the basis of the average life expectancy for persons of the decedent's age, was too slight to warrant taxation of the entire trust corpus. *See* 1949 U.S. Code Cong. Serv., 81st Cong., 1st Sess., 2172, 2185; *Estate of Allen, supra*, 558 F.2d 17-18 & n.8.

Thus the inquiry becomes whether tax equity will be substantially advanced by valuing reversionary interests, for purposes of applying the 5% cutoff rule, by means of gender-distinct tables. One important indication that tax equity will *not* be significantly promoted by gender-distinct tables is the recent decision of the Treasury to abandon the use of such tables. Effective December 1, 1983, the Treasury resumed the use of a unisex mortality table, returning to the practice that had been followed prior to 1970. *See* Treas. Reg. § 20.2031-7(a). I do not suggest that taxation is a field requiring the Government

to use the least restrictive means in accomplishing its legitimate objectives. And what the Government elects to do is of course not the determinant of what the Constitution minimally requires it to do. Nevertheless, in the inquiry as to whether gender-distinct tables "substantially" promote an "important" governmental objective, the fact that the Government has come to realize that it can adequately meet its objectives without the use of the challenged discrimination is at least relevant.

Finally, I examine the *degree* to which the use of gender-distinct tables achieves the asserted interest in promoting the accuracy of even the theoretical valuation being made. This requires consideration of what we mean when we say that women as a class live longer than men. We surely do not mean that all women live longer than all men. We do not even mean that most women live longer than most men. One thing we do mean has been expressed by those knowledgeable in the field in the following statistical terms: A woman at the mean of the distribution of mortality for all women will live longer than a man at the mean of the distribution of mortality for all men. *See* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A legal and Demographic Analysis*, 47 U. Chi. L. Rev. 505, 513 (1980) (*"Demographic Analysis"*). That observation, however, tells us little about the degree of accuracy achieved by gender-distinct tables compared to a unisex table. More helpful is the fact that, for a group of people chosen at random, more than 80% of all female deaths can be matched with the deaths of males of the same age.[6] *Demographic Analysis, supra*, at 531. It

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[6] The statistic is based on an analysis of a group of males and females aged 65. Bergmann & Gray, *Equality in Retirement*

[Footnote continued on following page]

was this fact that led Judge Stewart to conclude in this case that "only 20% of all women actually do outlive men." [7] 576 F. Supp. at 842.

Gender-distinct tables uniformly estimate a longer life expectancy for all women compared to all men when in fact that estimate turns out to be true for no more than 20% of women.[8] Whether or not the enhanced degree of accuracy in predicting the life expectancy of women as a class would satisfy equal protection standards in a case involving the purchase of retirement benefits, which must be priced prospectively, gender-based tables do not provide a sufficient increment of accuracy to justify the gender-based discrimination inherent in their use

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[Footnote continued from previous page]

Benefits, Civ. Rights Dig., Fall 1975, at 25. The accuracy, though not the significance, of the statistic has been widely accepted. *Compare Demographic Analysis*, *supra*, at 531 (arguing in reliance on the statistic), *with* Kimball, *Reverse Sex Discrimination*: Manhart, *supra*, at 121-22 (accepting the statistic but characterizing the argument from it as a "fallacy" when applied to benefits that must be priced prospectively). For a group randomly selected from the entire population, without regard to age, the extent to which male and female deaths can be matched is probably somewhat lower than the figure reported from the group aged 65.

[7] The 20% figure appears to be the maximum possible consequence of the fact that 80% of male deaths can be matched with female deaths at the same age. Though most of the unmatched men (a fact reflected in the higher average life expectancies for women as a class), there are undoubtedly some of the unmatched men who live longer than some of the unmatched women. The true percentage of women who outlive men is probably slightly less than 20%.

[8] Even this slight increase in predictive accuracy is brought into question by the tendency for the differential between male and female life expectancies to change rapidly. *Demographic Analysis*, *supra*, at 558; Brilmayer, Laycock & Sullivan, *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. Chi. L. Rev. 222, 236 (1983) ("Such an unstable [differential] means that sex is not even a reasonable predictor of the longevity of groups.").

when applied to the theoretical valuation of a reversionary interest in a trust just prior to a decedent's death, a valuation that is always made retrospectively. *Cf. Craig* v. *Boren, supra*, 429 U.S. at 199-204 (invalidating discriminatory drinking age statute on grounds of insufficient statistical correlation between alcohol-related traffic offenses and gender).

The majority opinion, in contending that the discrimination involved in this case is not unlawful, rests heavily on the assertion that "the class of all directly affected women" has not been shown to be disadvantaged "compared to the class of all directly affected men." — F.2d at ——. The majority makes this assertion after noting the indisputable fact that all other things being equal, under gender-distinct tables, the value of the reversionary interest when the beneficiary is a female is always lower than the value when the beneficiary is a male. From this fact the majority draws what I believe is the totally unsupportable conclusion that "the IRS practice places female beneficiaries in better positions than male beneficiaries." *Id.* at ——. To appreciate the flaw in the majority's argument, one must recognize that the "beneficiary" whose gender affects the value of the reversionary interest is not necessarily the same person who benefits from the tax saving in the event the trust is not included in the taxable estate. The "beneficiary" whose gender affects the value of the reversionary interest is the second life tenant of the trust. The identity of the "beneficiaries" of a reduction in estate taxes depends on how the estate tax attributable to the trust corpus is allocated among *all* persons who would benefit from property of the taxable estate, who may be male, female, or neuter in the case of charities. The second life tenant benefits from the non-inclusion of the corpus in the dece-

dent's taxable estate only in those circumstances where the trust corpus would have borne all or a portion of the estate taxes thereby saved. The most that can be said is that changing the gender of the successor life tenant beneficiary from male to female tends to reduce the possibility of an estate tax on the value of the trust corpus, a consequence that will benefit all the beneficiaries of the estate whose interests would have borne the taxes that are saved and, in some circumstances, will benefit the successor life tenant of the trust. But there is no subclass of female beneficiaries who always comes out better.

Moreover, even if female beneficiaries sometimes fare better under gender-distinct tables (as in those instances when they happen to be included among the legatees who benefit from reduced estate taxes), that consequence does not eliminate the valid complaint of all female settlors that their gender always results in a higher valuation of the reversionary interest than would occur if these settlors had been males. The focus of an inquiry into whether a gender discrimination adversely affects all class members must be confined to the similarly situated members of that gender. A civil service scoring system that reduces the test scores of all female candidates by five points would not be saved by a proviso that the daughter of any applicant would be entitled to a five-point bonus.

The significance of the dispute in this case has been substantially reduced by the Government's voluntary abandonment of gender-distinct tables to value reversionary interests. The consideration of gender-distinct tables, however, will be with us for many years to come. In this case, for all of the reasons set forth, I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MANUFACTURERS HANOVER TRUST COMPANY, as EXECUTOR OF THE ESTATE OF CHARLOTTE C. WALLACE,	:	82 Civ. 724 (CES)
Plaintiff,	:	MEMORANDUM DECISION
-against-	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

STEWART, District Judge:

This action is brought by Manufacturers Hanover Trust Company, as executor of the estate of Charlotte C. Wallace ("Estate"). Plaintiff challenges the Commissioner of Internal Revenue's ("Commissioner") use of gender-based mortality tables in calculating the present value of the reversionary interest in the trust of the decedent. This valuation determines whether the trust may be included in the estate of a decedent and therefore, be taxable. Plaintiff instituted this action for the refund of federal estate taxes from the United States of America ("Government").[1] Jurisdiction in this court is based on 26 U.S.C. §7422 and 28 U.S.C. §§1331, 1346(a)(1). Both parties have moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). We begin with a description of the undisputed facts.

On November 5, 1923, Charlotte Wallace established a trust and retained the right to the trust's income for her life. At the

same time, she named her son Howard the beneficiary, to receive the income from the trust after her death. Charlotte also retained a reversionary interest in the trust income if her son predeceased her. On February 28, 1976, Charlotte died at the age of 88, and was survived by her son, who was 57 years old at the time.

Internal Revenue Code §2037 provides that the value of a decedent's reversionary interest in a trust is includable in the decedent's gross estate if the value of that reversionary interest, immediately before the decedent's death, exceeds 5 percent of the value of the corpus. The Treasury Regulations ("Regulations")[2] provide both the actuarial tables and formulas to be used to calculate the value of the reversionary interest. Under the Regulations, the value of the reversionary interest is a function of the life expectancies of both the decedent and the trust beneficiary. The tables employed give one set of life expectancies for men and another for women.

The parties agree that the decedent in this case retained a reversionary interest within the meaning of section 2037, and that the present value of her reversionary interest exceeded the 5 percent limit when calculated with the sex-based mortality tables contained in the Treasury Regulations at issue. The parties further agree that the sex-based tables would yield the following results in the following situations:

Sex and Age of Decedent	Sex and Age of Beneficiary	Present Value of Reversionary Interest
Female age 88	Male age 57	.06654
Male age 88	Male age 57	.06415
Female age 88	Female age 57	.03520
Male age 88	Female age 57	.03390

Finally, the Government admits that the value of the reversionary interest is below the 5 percent limit, and thereby not taxable, when calculated under the gender-neutral tables called for by the plaintiff.[3]

The plaintiff challenges the Commissioner's use of the gender-based mortality tables on two grounds: first, that such tables exceed the Commissioner's statutory authority to promulgate regulations containing actuarial tables; and second, that such tables constitute impermissible gender discrimination that deprives the plaintiff of due process of law guaranteed by the fifth amendment. We address each of the grounds in turn.

I. *The Secretary's Statutory Authority to Promulagate the Regulations*

Plaintiff argues that the Regulations are beyond the authority granted to the Secretary by I.R.C. §2037. Section 2037 provides in pertinent part:

> The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary.

Plaintiff argues that this section did not authorize the Secretary to promulgate regulations that employ sex-based distinctions. We reject this argument.

The cases that plaintiff relies upon to argue that the Regulations are beyond the Secretary's statutory authority hold that the Secretary is authorized to promulgate regulations using an actuarial approach, which do not consider the actual health and physical condition of the beneficiary or decedent immediately prior to death. *See*, *Estate of Allen v. United States*, 558 F.2d 14 (Ct. Cl. 1977); Rev. Rul. 66-307, 1966-2 C.B. 429; *Estate of Dwight B. Roy, Jr.*, 54 T.C. 1317 (1970); *Robinson v. United States*, 454 F. Supp. 1160 (N.D. Cal. 1978), *aff'd*, 632 F.2d 822 (9th Cir.

1980). Yet the finding that the Secretary *need* not issue regulations that take into account factors other than age is greatly different from the conclusion that the Secretary *may* not. Indeed, as the Court of Claims noted in *Estate of Allen*, nothing in this legislative history specifically precludes such extrinsic considerations, or even specifically says that mortality tables are the sole method of valuation. 558 F.2d at 18. The question under section 2037, therefore is whether the sex-based tables represent a "usual method of valuation." We find nothing in the record that suggests they are not, and the cases and commentaries certainly suggest they are commonly used. *See, e.g., Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 725-26 (1978) (Burger, J. dissenting) ("Gender-based actuarial tables have been in use since at least 1843, and their statistical validity has been repeatedly verified. The vast life insurance, annuity and pension plan industry is based on these tables" (footnote omitted)). We thus conclude that the promulgation of the Regulations was not beyond the delegation of authority in section 2037.

II. *Constitutionality of the Regulations*

The cross-motions for summary judgment on the issue of the constitutionality of the Treasury Regulations present three distinct issues: 1) do the Regulations discriminate on the basis of sex? 2) if so, does the plaintiff here have standing to raise a constitutional challenge to them? and 3) if so, is this discrimination impermissible under the fifth amendment?

With respect to the first question, it appears clear that the Regulations do discriminate on the basis of sex. The Regulations set forth two separate sets of tables, with the sexes of the decedent and the transferee the factors that determine which table is to be used. The Government argues that the Regulations do not discriminate on the basis of sex because the tax is assessed against an estate "– a legal fiction that is separate and distinct from the decedent and that, of course, lacks any gender." Memorandum of Law in Opposition at 24. Inasmuch as the Regulations refer to the sex of the decedent to value assets contained in the estate, however, they distinguish between the estates

of women and the estates *of men*. Accordingly, we find this argument without merit.

The government further argues that the Regulations do not discriminate on the basis of sex because "whether the transfer is in fact includable in the gross estate...turns on the value of the transferor's reversionary interest, not his sex." *Id.* at 25. The Government continues: "The value of the reversionary interest, in turn, depends solely upon the probable longevity of the decedent and the transferee (discounted to present value), as derived by usual accounting measure." *Id.* at 25. In making this argument, however, the Government fails to take the crucial final step that defeats its cause: under the Regulations, "probable longevity" is determined on the basis of sex. It is this last step that we deem the most significant, and thus, we reject this argument by the Government as well.

The Government finally argues that the Regulations do not discriminate on the basis of sex because the Trust would have been taxable to the estate if Mrs. Wallace had been a man. This argument confuses a standing question with the question of the basis upon which the Regulations distinguish between two otherwise similarly situated individuals. The fact that the tables yield different values in Mrs. Wallace's case and in a hypothetical case involving an 88 year old male decedent is evidence that the tables do distinguish on the basis of sex.

As for plaintiff's standing to bring a constitutional challenge to these sex-based Regulations, we believe the plaintiff in this case has established injury in fact sufficient to guarantee "concrete adverseness." *Craig v. Boren*, 429 U.S. 190, 194 (1976) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Plaintiff is the executor of the estate of Charlotte Wallace. As such, plaintiff has a duty to act for the best interest of all parties interested in the estate. *In re Dickson's Estate*, 38 Misc.2d 678, 237 N.Y.S.2d 572 (Surr. Ct. 1963). It is undisputed that through the use of sex-based tables rather than the unisex tables that plaintiff proposes, the estate is required to pay some $450,000 in taxes that it would not otherwise be required to pay.

With respect to the Government's argument that this case should be dismissed because the Trust would have been included in the estate if Mrs. Wallace had been a man, we believe the more important inquiry is whether the Trust would be includable under the non-sex-based scheme. Under such a table, plaintiff would pay no taxes. It is clear that plaintiff has shown the requisite "causal connection between the injury it claims and the conduct it challenges, so that if the relief sought is granted, the injury will be redressed." *Watt v. Energy Action Educational Foundation*, 102 S.Ct. 205, 212 (1981) (citation omitted).

Having determined that the challenged Regulations discriminate on the basis of sex and that plaintiff has standing to raise a constitutional challenge to them, the next inquiry is whether the Regulations' discrimination is constitutionally permissible.

The usual standard by which gender-based classifications are judged is one of heightened scrutiny. *See, e.g., Mississippi University for Women v. Hogan*, 102 S.Ct. 3331, 3336 (1982); *Reed v. Reed*, 404 U.S. 71, 76 (1971). As was stated in *Craig v. Boren*, 429 U.S. 190, 197 (1976):

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.

The party seeking to uphold the statute must show an "exceedingly persuasive justification" for classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979).

In this case, however, the Government argues that a lower level of scrutiny in appropriate because the law at issue is a tax regulation. While it is true that tax legislation is traditionally accorded great deference, *see, e.g., Madden v. Kentucky*, 309 U.S. 83, 88 (1944), deference does not mean that all legislation touching upon internal revenue matters is immune from all constitutional strictures. A tax law that employed "suspect classifications", for

instance, would not be tolerated, let alone deferred to. *See Regan v. Taxation With Representation of Washington*, 103 S.Ct. 1997, 2002 (1983).

Kahn v. Shevin, 416 U.S. 351 (1974), cited by the Government in support of its argument that minimal scrutiny is appropriate, does not persuade us of the Government's position. *Kahn* found constitutional a Florida statute granting widows, but not widowers, a property tax exemption. In upholding the statute, Justice Douglas found that the purpose of the statute was to "further that state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." 416 U.S. at 355. The differing treatment of widows and widowers, Justice Douglas noted, "rest[ed] upon some ground of difference having a fair and substantial relation to the object of legislation" *Id.* (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)). Thus while *Kahn* does cite earlier cases applying a rational relation test to tax legislation, it in fact applied *Reed*'s heightened scrutiny test. We thus conclude the "middle tier" level of scrutiny, as articulated in *Craig v. Boren*, is appropriate in this case.

As stated above, in order to withstand a constitutional attack, a gender-based classification must further a legitimate and important state objective. It must also exhibit a direct and substantial relationship between the objective and the means employed. *Mississippi University for Women v. Hogan*, 102 S.Ct. at 3337. The requirement of a close relationship is to insure that statutes which rely on gender as a "proxy for other, more germane bases of classification," *Craig v. Boren*, 429 U.S. at 198, will not be upheld.

According to the Government, the important objective these Regulations seek to achieve is an accurate determination of the present value of a decedent's reversionary interest in a trust. The Government contends that the gender-based tables provide a more accurate forecast of life expectancy, and therefore, enable the Commissioner to tax estates based on actual worth, rather than an estimated value. This objective, however, will not be considered

an "important" one if it is not sufficiently tailored to meet the objective, *Craig v. Boren*, 429 U.S. at 197-98, or if it is being used merely for administrative convenience. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

In this case, there appear to be questions of fact as to whether the Government's objective is an "important" one, or whether administrative convenience is not the actual goal. However, we need not resolve this factual issue because we find that, assuming the importance of the Government's goal, the sex-based classifications do not have the requisite direct and substantial relationship to the objective of a more accurate valuation of a reversionary interest.

It has been said that gender based tables are in fact but a proxy for other factors which enter into longevity, such as smoking habits, alcohol consumption, medical history or family history. *See Manhart*, 435 U.S. at 709-10. The fact that longevity statistics have been kept on the basis of gender, and thus are a shorthand method of achieving some degree of precision in the valuation of a reversionary interest, does not justify their continued use in the name of accuracy. *See Manhart*, 435 U.S. at 710. The Government's admittedly important goal of accuracy blurs into an administrative convenience argument, which is not a constitutionally permissible basis for a gender classification. *Frontiero*, 411 U.S. at 690; *Stanley v. Illinois*, 405 U.S. at 656.

According to the statistics upon which these tables are based, only 20% of all women actually do outlive men. As the Supreme Court noted, while women as a class live longer than men,

> [i]t is equally true, however, that all individuals in the respective do not share the characteristic that differentiates the average class representative. Many women do not live as long as the average man and many men outlive the average woman. *Manhart*, 435 U.S. at 708.

In the Title VII context, the Supreme Court has clearly stated that sex cannot be used to predict longevity because it results in

discrimination against individual women who do not fit the statistical norm. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S.Ct. 3492, 3498 (1983); *Manhart*, 435 U.S. at 708. The use of sex-based tables in this case also results in discrimination against individuals. The Treasury Regulations serve to penalize the woman who dies before her statistically predicted age, while at the same time penalizing the man who dies after his predicted age.

Like Title VII, the equal protection component of the fifth amendment is concerned with individual rights, which should not be determined on the basis of class composites.* *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Frontiero*, 411 U.S. at 686. Many statutes struck down as discriminatory on the basis of gender under the fifth or fourteenth amendment contained presumptions about financial needs, sophistication in business matters and proclivities for drunken driving that the Supreme Court acknowledged may have been empirically based. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 151 (1979); *Craig v. Boren*, 429 U.S. at 201-202. Any statistical argument to justify class treatment on the basis of gender is questionable:

> It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. *Craig v. Boren*, 429 U.S. at 204.

Where only 20% of the members of the class comport with the generalization that this regulation embodies, the effect on individual rights is substantial. Moreover, the use of the statistics cannot be said to have a direct and substantial relationship to the accurate valuation of any one individual's reversionary interest.

The Government asserts that the challenged classification is permissible because men and women are not similarly situated with respect to longevity. The cases that the Government relies on for this statement are distinguishable.[5] In addition, this argument once again presumes that the different life expectancies for men and women reflect some "innate differences" between the sexes, as opposed to being a proxy for other, gender-neutral factors. *Manhart*, 435 U.S. at 709-10.

The Government has simply not made a strong enough showing that sex-based tables are necessary to achieve their goal of accuracy in evaluating reversionary interests. There are more accurate ways to achieve their end, which do not take sex into account. The Government has also made no showing that the proposed unisex tables are substantially less accurate than the current ones in use; indeed, until 1970, unisex tables were used by the Treasury.

Finally, the use of sex-based tables in the tax context is particularly inappropriate where the statistics are not being used in any predictive sense. The use of gender based tables to compute pension benefits was precluded by the Supreme Court in the Title VII context despite strong equity arguments: pay-ins and pay-outs in the benefits area are directly affected by longevity and the accuracy of the predictions. In this case, the decedent and trust beneficiary have either beaten or not beaten the statistics. The process of valuation is more abstract, yet individuals are penalized on the basis of a class composite.

The standards for summary judgment pursuant to Fed.R.Civ.P 56(c) are well established. The burden is on the moving party to "demonstrate the absence of any material factual issue genuinely in dispute." *American International Group, Inc. v. London American International Corp. Ltd.*, 664 F.2d 348 (2d Cir. 1981) (quoting *Reyman v. Commerce and Industry Insurance*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). Since the Government admits that the use of non gender-based tables will result in the trust's exclusion from the decedent's gross estate for tax purposes, the case is well suited for summary judgment.

The Government has failed to sustain its burden of demonstrating that the Treasury Regulations are substantially related to its important objective of determining the present value of reversionary interests. It is our determination that the challenged classifications constitute impermissible gender-based discrimination, and therefore, we grant plaintiff's motion for summary judgment and deny the Government's cross-motion.

SO ORDERED.

/s/ Charles E. Stewart
United States District Judge

Dated: New York, New York
October 17, 1983

FOOTNOTES

1. On November 26, 1976, the Estate filed a federal tax return and did not list the trust which was valued at $1,244,863.64 as of the date of Charlotte's death, as an asset. On January 3, 1980, the Commissioner assessed a deficiency in the amount of $458,662.18. On August 22, 1980, the Estate paid the deficiency and filed an administrative claim for a regund which was subsequently denied. The instant action followed.

2. The Treasury Regulations in question are: 26 C.F.R. §§20.2037-1(c)(3), 20.2031-7(a)(d)(e), 20.2031-10(d)(e)(f). These regulations, *United States Life Tables: 1959-61* are published by the Dep't of Health, Education and Welfare, Public Health Service.

3. The mortality tables upon which plaintiff bases its claim are taken from the same source as the Commissioners' gender-based tables, the *United States Life Tables: 1959-61*, published by the Dep't of Health, Education and Welfare, Public Health Service. Under these unisex tables, the value of decedent's reversionary interest would be 4.9867%.

4. As recently stated by the Supreme Court, "The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the states." *Regan v. Taxation with Representation of Washington*, 103 S.Ct. 1997, 1999, n.2 (1983).

5. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the challenged statute drew classifications along the lines of past military service, not sex. In both *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464 (1981) (statutory rape laws) and *Rostker v. Goldberg*, 453 U.S. 57 (1981) (combat duty), the Supreme Court upheld statutes which "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.*, 450 U.S. at 469. In both *General Electric v. Gilbert*, 429 U.S. 125 (1976) and *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Supreme Court upheld statutes which did not include pregnancy as a disability, denying petitioners' claims of sex discrimination.

SDNY
82 CV 0724
STEWART

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixteenth day of September one thousand nine hundred and eighty-five

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND,

HON. JON O. NEWMAN,

HON. GEORGE C. PRATT,

Circuit Judges,

MANUFACTURERS HANOVER
TRUST COMPANY, as
EXECUTOR OF THE ESTATE
OF CHARLOTTE C. WALLACE,

84-6051

Plaintiff-Appellee,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed, in accordance with the opinion of this court.

ELAINE B. GOLDSMITH
Clerk,

by: Edward J. Guardaro
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 22nd day of October one thousand nine hundred and eighty-five

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MANUFACTURERS HANOVER TRUST COMPANY, as EXECUTOR OF THE ESTATE OF CHARLOTTE C. WALLACE,

Docket No. 84-6051

Plaintiff-Appellee,

-v-

UNITED STATES OF AMERICA,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiff-Appellee.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MANUFACTURERS HANOVER TRUST COMPANY, as EXECUTOR OF THE ESTATE OF CHARLOTTE C. WALLACE,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

82 Civ. 724 (CES)

MEMORANDUM ENDORSEMENT

The motion for reargument is denied. The Government has cited no controlling authority that was overlooked in our Memorandum Decision of October 17, 1983; nor has the Government raised any new matters that were not addressed in that decision.

SO ORDERED.

/S/ Charles E. Stewart
United States District Judge

Dated: New York, New York
November 29, 1983

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1142 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

MANUFACTURERS HANOVER TRUST COMPANY,
AS EXECUTOR OF ESTATE OF CHARLOTTE C. WALLACE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Commissioner's former practice of using gender-based mortality tables to value reversionary interests of a decedent's estate for purposes of Section 2037 of the Internal Revenue Code violated the equal protection component of the Fifth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Arizona Governing Committee v. *Norris*, 463 U.S. 1073 ..... 7, 9, 10

City of Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 ..... 7, 9, 10

Craig v. *Boren*, 429 U.S. 190 ..... 5, 6

Estate of Spiegel v. *Commissioner*, 335 U.S. 701 4

General Electric Co. v. *Gilbert*, 429 U.S. 125 10

Helvering v. *Hallock*, 309 U.S. 106 4

Kahn v. *Shevin*, 416 U.S. 351 6

Michael M. v. *Superior Court*, 450 U.S. 464 6-7

Mississippi University for Women v. *Hogan*, 458 U.S. 718 5-6

Parham v. *Hughes*, 441 U.S. 347 6

Regan v. *Taxation With Representation*, 461 U.S. 540 6

Page

Cases—Continued:

Rostker v. *Goldberg*, 453 U.S. 57 7

Wengler v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 ..... 6, 8

Constitution, statutes and regulations:

U.S. Const. Amend. V 3, 5

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 10

42 U.S.C. 2000e-2(a) 10

42 U.S.C. 2000e-2(e) 10

Internal Revenue Code of 1954 (26 U.S.C.):

§ 2037 ..... 2, 3, 4, 8, 9, 11

§ 2037(b) 2

Revenue Act 1916, ch. 463, § 202(b), 39 Stat. 777-778 4

Treas. Reg. :

§ 1.72-9 11

§ 1.401(j)-4(a)(1)(ii) 11

§ 1.403(b)-1(d)(4)(ii) 11

§ 1.408-2(b)(6)(iv) 11

§ 20.2031-10(d) 2, 4

§ 20.2031-10(e) 2, 4

§ 20.2031-10(f) 2, 4

§ 20.2037-1(c)(3) 2

§ 20.2037-7(a)(1) 11

Page

Constitution, statutes and regulations—Continued:

§ 20.2031-7(d) 11

§ 20.2031-7(e) 11

§ 20.2031-7(f) 11

Miscellaneous:

48 Fed. Reg. 50087 (1983) 11

49 Fed. Reg. 19973 (1984) 4, 11

H.R. Conf. Rep. 1412, 81st Cong., 1st Sess. (1949) 4

1 Public Health Service, U.S. Dep't of Health, Education, and Welfare, *Vital Statistics of the United States: 1964* (1966) 2

S. Rep. 831, 81st. Cong., 1st Sess. (1949) 4

T.D. 7955, 1984-1 C.B. 40 ..... 4, 11

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1142

MANUFACTURERS HANOVER TRUST COMPANY,
AS EXECUTOR OF ESTATE OF CHARLOTTE C. WALLACE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 775 F. 2d 459. The opinion of the district court (Pet. App. A38-A49) is reported at 576 F. Supp. 837.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1985 (Pet. App. A50-A51), and rehearing was denied on October 22, 1985 (Pet. App. A52). The petition for a writ of certiorari was filed on January 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 5, 1923, Charlotte C. Wallace established a trust that provided income to her for her life and, on her

death, income to her son Howard. The corpus of the trust was to pass by the terms of Howard's will if he outlived his mother, but by the terms of Charlotte's will if he predeceased her. Charlotte died on February 28, 1976, at the age of 88; she was survived by Howard, who was then 57 years old. Pet. App. A3.

Section 2037 of the Internal Revenue Code of 1954 (26 U.S.C.) provides that property in which a decedent has retained a reversionary interest must be included in the gross estate if the value of the reversionary interest immediately before the death of the decedent exceeds 5% of the value of the property. Section 2037(b) provides that "[t]he value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary."

Treasury regulations in effect at the time of Charlotte's death required the value of a reversionary interest to be computed according to gender-based mortality tables. Treas. Reg. §§ 20.2031-10(d), (e) and (f), 20.2037-1(c)(3). Petitioner (the executor of Charlotte's estate), however, calculated the value of the decedent's reversionary interest using Unisex Table 1 of the *United States Life Tables: 1959-1961*, published by the then Department of Health, Education, and Welfare, and determined the value to be 4.9867%. Because that value fell below the statutory 5% cutoff, petitioner paid no federal estate tax on the trust corpus. 1 Public Health Service, U.S. Dep't of Health, Education, and Welfare, *Vital Statistics of the United States: 1964*, at 3 (1966); Pet. App. A4.

The Commissioner determined that the trust corpus should be included in Charlotte's gross estate because, using the gender-based tables in the regulations, the value of

Charlotte's reversionary interest was 6.654%. Petitioner paid the resulting $458,662.18 estate tax deficiency and, following the denial of an administrative claim for refund, brought this refund action in the district court, contending that the Commissioner's use of gender-based mortality tables violated the equal protection component of the Fifth Amendment. Pet. App. A4, A49.

The district court agreed with petitioner's contention that the challenged practice was unconstitutional (Pet. App. A38-A49). The court assumed that the government's objective in using the tables—achievement of an accurate forecast of life expectancy for purposes of valuing reversionary interests under Section 2037—was an important one, but concluded that "the sex-based classifications do not have the requisite direct and substantial relationship" to that objective (*id.* at A45). On that ground, the court declared the tables invalid (*ibid.*). Because the use of unisex mortality tables would result in exclusion of the corpus of the trust from Charlotte's gross estate, the court awarded petitioner the claimed refund (*id.* at A47).

The court of appeals, in a split decision, reversed (Pet. App. A1-A37). The court concluded that the use of gender-based mortality tables to value reversionary interests for purposes of Section 2037 constituted discrimination based on gender (Pet. App. A5-A10), but held that the gender classification was constitutional because it was substantially related to the important governmental objective of promoting equity and fairness in estate taxation by accurately valuing reversionary interests (Pet. App. A10-A21). The court observed that the challenged practice distributed comparative benefits as well as comparative burdens to both men and women (*id.* at A13-A16), and that the gender classification did not demean women or men and was not based on stereotyped assumptions about social roles (*id.* at

A16). Finally, the court concluded that Section 2037 legitimately focused on average life expectancies, and that "the increased accuracy of gender-based tables constitutionally justifies their use" in this context (Pet. App. A21).

ARGUMENT

The decision below is correct and, contrary to petitioner's contention, is not inconsistent with any decision of this Court. There is no claim, or basis for a claim, of a conflict in the circuits on the question presented. The Treasury, moreover, has adopted the use of gender-neutral mortality tables for estate tax purposes for decedents dying after November 30, 1983,[1] and the issue presented therefore lacks continuing importance.

1. Determining the value of a decedent's reversionary interest in property for purposes of Section 2037 of the Internal Code requires calculating the probability (just prior to death) that the decedent would outlive the beneficiary.[2] The Treasury regulations in effect at the time of Charlotte's death used gender-based mortality tables to

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[1]T.D. 7955, 1984-1 C.B. 40, *reprinted in* 49 Fed. Reg. 19973 (1984).

[2]When the federal estate tax was first enacted in 1916, all property subject to a transfer "intended to take effect in possession or enjoyment at or after [the transferor's] death" was includible in the transferor's gross estate. Revenue Act, 1916, ch. 463, § 202(b), 39 Stat. 777-778. In *Helvering* v. *Hallock*, 309 U.S. 106, 112 (1940), the Court held that a transfer of property subject to a reversionary interest that expired upon the transferor's death was a part of the gross estate. This rule was taken to its extreme in *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701 (1949), in which a $1,140,000 trust was included in the settlor's gross estate even though the value of the settlor's reversionary interest was approximately $70. In response, Congress enacted the predecessor of Section 2037. The policy of taxing transfers subject to a reversionary interest was preserved, but where the value of the reversionary interest fell below 5% of the trust, the decedent's interest was considered to be insignificant, and the trust was not includible in the gross estate. See H.R. Conf. Rep. 1412, 81st Cong., 1st Sess. 6-7 (1949); S. Rep. 831, 81st Cong., 1st Sess. 8 (1949).

determine the life expectancy of decedents and beneficiaries. Treas. Reg. § 20.2031-10(d), (e) and (f). As the court of appeals observed (Pet. App. A6-A7), the use of gender-based tables, rather than gender-neutral tables, affects the calculation of the value of a reversionary interest in two ways. First, where the decedent is female, the value of the reversionary interest will be greater than it would be were the decedent a similarly situated male[3] because the female decedent would have been more likely to outlive the beneficiary than would a male decedent. Second, regardless of the sex of the decedent, if the beneficiary is female the value of the reversionary interest will be less than it would be if the beneficiary were male, because a female beneficiary would have been more likely to outlive the decedent than would a similarly situated male beneficiary (*id.* at A6-A7).[4]

Because the Commissioner's use of gender-based tables treated similarly situated men and women differently in a way that could affect the amount of the estate tax, the court of appeals concluded that the practice "constitutes discrimination based on gender" (Pet. App. A8). The court correctly held, however, that the challenged practice did not violate the equal protection component of the Fifth Amendment (*id.* at A10-A21).

In determining that the gender classification in issue was constitutional, the court below applied the standard articulated in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), that "classification by gender must serve important governmental objectives and must be substantially related to

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[3] *I.e.*, a male of the same age with a beneficiary of the same age and gender.

[4] Of course, it is only when the value of the reversionary interest was close to 5% that these differences would have had a significant practical effect.

achievement of those objectives."[5] The court observed that the gender-based tables were adopted in 1970 in the interest of greater actuarial accuracy, and correctly held that such accuracy is an important government objective (Pet. App. A11-A13). Since the accurate valuation of reversionary interests promotes equity and fairness in estate taxation (*id.* at A3, A12), there can be no doubt that a material increase in that accuracy substantially serves an important objective.

There is no mechanical test for determining whether a gender-based classification satisfies the substantial relationship standard. This Court has, however, consistently struck down gender-based classifications "which demean the ability or social status of the affected class" (*Parham* v. *Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion)), or are based on stereotyped or traditional assumptions "about the proper roles of men and women" (*Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 726 (1982) (footnote

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[5]Petitioner erroneously asserts (Pet. 9, 20) that the court of appeals failed to apply this Court's cases requiring that the government show an " 'exceedingly persuasive justification' " for a gender-based classification. In *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982) (citation omitted), on which petitioner relies (Pet. 20), the Court stated that this burden is met "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives' " (458 U.S. at 724, quoting *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980)). The court of appeals applied that standard here (Pet. App. A3, A10).

The court of appeals rejected the government's argument that the "rational basis" standard provides the appropriate level of scrutiny in evaluating a challenge to a gender-based tax classification (Pet. App. A10-A11). See, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 547 (1983) ("[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes"). Cf. *Kahn* v. *Shevin*, 416 U.S. 351, 355-356 (1974). Since the provision in issue here passes constitutional muster under the heightened scrutiny of the *Craig* v. *Boren*, *supra*, standard, however, there is no need in this case to decide whether a lower level of scrutiny would be appropriate.

omitted)). Conversely, "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.* v. *Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion); see also *Rostker* v. *Goldberg*, 453 U.S. 57, 79 (1981). The classification in issue here plainly falls into the latter category. Gender-based mortality tables are not based on demeaning generalizations or stereotyped assumptions (Pet. App. A16). Rather, they reflect a real sex mortality differential.[6]

Moreover, as the court of appeals noted, "[w]hen discrimination on the basis of gender has been found to violate the constitution, it has always been the case that the directly affected women (or men) as a class were disadvantaged" (Pet. App. A14). Here, by contrast, the use of gender-based tables for purposes of Section 2037 "distributes comparative benefits to both men and women, and distributes comparative burdens to both men and women" (Pet. App. A21). This is because beneficiaries, as well as decedents, are directly affected by the use of those tables. Since a beneficiary's life expectancy is taken into account under Section 2037, and since the amount of the estate tax has an obvious

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[6]This Court has unanimously recognized that "[a]s a class, women live longer than men." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 704 (1978); *id.* at 724 (Blackmun, J., concurring in part and concurring in judgment); *id.* at 725-727 (Burger, C.J., concurring in part and dissenting in part) (footnotes omitted) ("Gender-based actuarial tables have been in use since at least 1843, and their statistical validity has been repeatedly verified.") See also *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1104 (1983) (Powell, J., dissenting in part and concurring in part) ("Sex-based mortality tables reflect objective actuarial experience."). Indeed, petitioner recognizes (Pet. 14) that "[g]reater longevity for women is * * * a group statistical observation", arguing only that the generalization is "unfair to an individual to whom it does not apply" (*id.* at 11). But see pages 10-11, *infra*.

impact on beneficiaries, the court correctly viewed beneficiaries as being "directly affected" by the challenged classification (Pet. App. A14). Although the challenged classification places a female decedent in a comparatively worse position than a male decedent, gender-based tables benefit female beneficiaries in comparison to men, because the value of the reversionary interest when the beneficiary is female is lower than the value when the beneficiary is a similarly situated male (*id.* at A6-A8, A14-A15). The court of appeals found no evidence that this "patchwork distribution of relative advantages and disadvantages" placed a greater aggregate burden on the class of directly affected women than on the class of directly affected men (*id.* at A15-A16). Although, as the court recognized (*id.* at A16), this unusual distribution of burdens and benefits is not dispositive, it is a factor that further demonstrates that there is nothing invidious about the use of gender-based tables for purposes of Section 2037.[7]

Finally, the use of gender-based mortality tables is substantially related to the particular valuation purpose of Section 2037. In all cases where Section 2037 comes into

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[7]There is no merit to petitioner's assertion (Pet. 16, 19) that the court's examination of the effect of gender-based tables on beneficiaries conflicts with this Court's decision in *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980). There, the Court held invalid a law that provided that workers' compensation death benefits would be paid to a widow regardless of whether she could prove actual dependence on her husband's earnings, but that a widower would receive death benefits only if he proved actual dependence on his wife's earnings or was incapacitated. The distinction was evidently based on assumptions about the traditional roles of men and women. In addition, all directly affected men were burdened by the law in *Wengler* and all directly affected women were benefited; employees (both male and female) were only indirectly affected. By contrast, the provision involved here distributes direct benefits and burdens to both men and women—it directly affects the consequences attendant upon the decedent's choice of whether to retain a reversionary interest, as well as what will be received by the beneficiary.

play, the decedent has in fact predeceased the beneficiary, and the decedent's reversionary interest therefore has no actual value. Section 2037 necessarily requires determination of a *theoretical* value based on the probability, just prior to death, that the decedent would have outlived the beneficiary, and, as the court of appeals observed (Pet. App. A20), Congress determined that use of average life expectancies was a fair way to determine this theoretical value. Since Section 2037 legitimately focuses on averages rather than on individual situations, and "gender-based mortality tables * * * give more accurate averages of life expectancies than do gender-neutral tables" (Pet. App. A21), the gender classification used in the tables is substantially related to the achievement of the important governmental objective of accurate valuation of reversionary interests.[8]

2. There is no merit to petitioner's contention (Pet. 8-9, 10, 12-13) that the decision below conflicts with *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983). Those cases involved the use by employers of gender-based mortality data to provide different pension plan treatment for male and female employees. In *Manhart*, the employer required female employees to make higher monthly pension contributions than male employees. In *Norris*, the pension plan paid

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[8]Although the Treasury has decided to use gender-neutral tables for decedents dying after November 30, 1983, that decision, contrary to petitioner's assertion (Pet. 20-21), does not establish that the prior practice of using gender-based mortality tables served no important governmental objectives. Instead, it simply shows that on reconsideration in light of intervening developments, the agency determined that an alternative approach was preferable (notwithstanding its diminution of actuarial accuracy). This is, of course, a decision for the agency, not the courts.

lower monthly benefits to female employees. Both employers justified their practices by relying on mortality tables showing that, on average, women live longer than men, and that women would therefore receive, on average, pension benefits over a longer period of time after retirement than men. The Court found in both cases that the pension plans discriminated on the basis of sex and therefore, ipso facto, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *Manhart*, 435 U.S. at 708-711; *Norris*, 463 U.S. at 1079-1086.

The effects of the use of gender-based statistics in *Manhart* and *Norris* were quite different from the effects here.[9] In those cases, the different treatment of men and women resulted in discrimination against individual women who did not fit the statistical generalization. See *Manhart*, 435 U.S. at 708; *Norris*, 463 U.S. at 1084-1086.[10] Under the statutory scheme involved here, the decedent's actual life

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[9]Moreover, both cases dealt with the requirements of Title VII, which prohibits all employer classifications based on sex in the absence of a bona fide occupational qualification (42 U.S.C. 2000e-2(a) and (e))—not with the constitutional equal protection requirements, which prohibit only gender-based classifications that are not substantially related to important objectives. Cf. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 133-137 (1976).

[10]Because each individual needs and receives retirement income only so long as he or she is alive to spend it, the employers were required in those cases to provide similarly calculated and funded periodic payments to both men and women for as long as each individual needs the payments. Here, by contrast, the reversionary interest tables principally served to effectuate the statutory decision to ameliorate a perceived inequity in the estate tax laws in order to exclude trusts with insignificant reversionary interests (see note 2, *supra*). In determining which interests would be deemed significant, it was reasonable to rely on average life expectancies, and, in calculating those expectancies, it was more accurate to use tables that included, among other factors, the gender of the parties involved. There is, in this context, no adverse effect on non-conforming individuals similar to that involved in *Norris* and *Manhart*.

expectancy is entirely irrelevant. Section 2037 necessarily focuses on probabilities and averages; the decedent—who, of course, is already dead and thus has no life expectancy—does not fit the statistical norm for average life expectancy whether gender-based or gender-neutral tables are used to determine that theoretical life expectancy. Accordingly, the court of appeals correctly concluded that the use of gender-based tables under Section 2037 "does not present the same kind of danger of unjustified discrimination against individuals as was found in *Manhart*" (Pet. App. A21).

3. Finally, the issue presented lacks prospective importance. In October 1983, the Treasury proposed new regulations that use gender-neutral tables to value reversionary interests for purposes of Section 2037 (48 Fed. Reg. 50087), and these new regulations were adopted in May 1984 (T.D. 7955, 1984-1 C.B. 40, *reprinted in* 49 Fed. Reg. 19973 (1984)). The new gender-neutral tables are applicable to decedents dying after November 30, 1983. See Treas. Reg. § 20.2031-7(a)(1), (d), (e) and (f). The constitutional question presented in this case is therefore one of diminishing importance that does not warrant further review by this Court.[11]

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[11] Although other Treasury regulations continue to use gender-based mortality data for various purposes relating to the income tax treatment of annuities and retirement plans (see Treas. Reg. §§ 1.72-9, 1.401(j)-4(a)(1)(ii), 1.403(b)-1(d)(4)(ii), 1.408-2(b)(6)(iv)), the validity of those regulations is not in issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FOR THE SECOND CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
ARGUMENT	2
1. The Government Has Offered No Support For Its Conclusory Argument That Accuracy Is An Important Governmental Objective	2
2. The Requirement That The Gender-Based Discrimination Must Satisfy The Relationship Standard Has Not Been Met	4
3. The Use of Gender-Based Tables Makes The Sterotypical Assumption That Women Do Not Work In The "Man's World"	4
4. The Impact on Female Or Male Beneficiaries Is Irrelevant	5
5. The Use of Gender-Based Tables Is Not Compatible With Congressional Intent	6
6. The Government Ignores The Court Of Appeals' Holding That The Discrimination Must Be Intentional	7
7. The Government's Argument On *Manhart* And *Norris* Is Unavailing	7
8. The Government, By Its Unilateral Action Of Adopting New Regulations, Cannot Undercut The Rights of Petitioner That Have Already Been Asserted In Pending Litigation	8
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)	7
City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978)	7
Craig v. Boren, 429 U.S. 190 (1976)	3,4
Estate of Dwight B. Roy, Jr., 54 T.C. 1317 (1970)	6
Estate of Henrietta Allen v. United States, 558 F.2d 14 (Ct. Cl. 1977)	6
Frontiero v. Richardson, 411 U.S. 677 (1973)	3
Hall v. United States, 353 F.2d 500 (7th Cir. 1965)	6
Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981)	4,5
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	3
Reed v. Reed, 404 U.S. 71 (1971)	3
Robinson v. United States, 454 F. Supp. 1160 (N.D. Cal. 1978), *aff'd*, 632 F.2d 822 (9th Cir. 1980)	6
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	3

STATUTES AND REGULATIONS

Internal Revenue Code §2037 (26 U.S.C. §2037)	4
Rev. Rul. 66-307, 1966-2 C.B. 429	6

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ON PETITION FOR WRIT OF CERTIORARI TO
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REPLY BRIEF

Petitioner submits this reply brief in support of its Petition for Writ of Certiorari. The Court is respectfully referred to the Petition For Writ of Certiorari and petitioner's appendix for a fuller statement of petitioner's position. The Court is also referred to Judge Newman's dissenting opinion below and to the District Court opinion which correctly find that the use of gender-based actuarial tables in this case is unconstitutional. (A 21-A 37 and A 38-A 48, respectively.)

ARGUMENT

1. *The Government Has Offered No Support For Its Conclusory Argument That Accuracy Is An Important Governmental Objective*

The government's Brief in Opposition ("Brief In Opp.") returns again to the theme that some purported greater accuracy is achieved by the use of gender based tables and that this purported accuracy is an important governmental objective which justifies the admitted gender discrimination here. (Brief in Opp. at 6.) The government, however, has not offered, and the Court of Appeals did not cite, any support for the conclusory statement that accuracy is an important governmental objective. Accuracy, in fact, is not achieved by the use of gender-based tables since gender-based tables are inaccurate more than 80% of the time. (A 17, A 34-A 35, A 45) Furthermore, it makes no sense to argue that the use of sex-based tables is more accurate when the valuation of decedent's reversionary interest is based on the fiction (i.e., the basic inaccuracy) that Mrs. Wallace might survive her son and when the purpose of the valuation is only to determine whether the value of the interest is more or less than an arbitrary 5% *de minimis* figure.

Likewise, the use of gender-based tables does not promote equity and fairness. They do just the opposite because women are more likely to be taxed than men, simply because they are women. (A 17, A 34-35, A 45) That type of sex-based treatment clearly cannot be countenanced today.

In fact, the government, by re-adopting unisex tables in December, 1983, has acknowledged that the purported accuracy achieved by the use of sex-based tables is not an important govermental objective and that the use of sex-based tables does not promote equity and fairness. The government's brief in opposition does not explain the return to the use of unisex tables other than to suggest that it was done "on reconsideration in light of intervening developments...." (Brief in Opp. at 9, fn. 8.) The government does not tell us what those "intervening developments" are or what that "reconsideration" consisted of. Rather,

it hides, in a footnote, behind a mere statement that this is "a decision for the regulatory agency." Id. We cannot assume that the government has been unaware of the myriad of opinions of this court and courts throughout the country that have found gender-based discrimination unconstitutional. Moreover, it was only after the District Court decided this case that the government returned to unisex tables. Thus, the "intervening developments" must have included the cases that have found gender-based discrimination unlawful and/or unconstitutional.

In light of the above considerations, the government must be held to its burden of an "exceedingly persuasive justification" for the gender-based classification. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The bare assertion by the government that accuracy is an important objective is not enough. In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Mississippi University*, 458 U.S. at 728, this Court held the mere statement of a benign purpose by the government does not justify a gender-based discrimination. Rather, a searching analysis must be made to determine the legitimacy of the government's purported objective:

> [W]e consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, *Reed v. Reed*, 404 U.S. 71 (1971), to achieve administrative efficiency, *Frontiero v. Richardson*, 411 U.S. 677 (1973), or to balance the burdens borne by males and females.

The constitutional requirement that the gender-based discrimination "serve important governmental objectives", therefore, has not been met. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

2. *The Requirement That The Gender-Based Discrimination Must Satisfy The Relationship Standard Has Not Been Met*

The government sidesteps the constitutional requirement that a gender-based classification "must be substantially related to achievement of" an important governmental objective (*Craig v. Boren*, *supra*, 429 U.S. at 197) and drifts into a discussion of whether the admitted discrimination is somehow invidious. (Brief in Opp. at 6-7.)

The objective of §2037 is to tax the privilege of *inter vivos* transfers. The 5% is an arbitrary figure to avoid the inclusion of the corpus when the interest is *de minimis*. The use of sex-based tables is not related to this objective. It does not make the taxation possible, or facilitate the taxation or make the taxation more fair. The use of gender-based tables does not reflect any difference between men and women that is relevant to the objective of taxation. The government, therefore, fails to show any relationship between the use of gender-based tables and the objective of the statute. (Even if accuracy were an important governmental objective, the use of gender-based tables is not substantially related to it because gender-based tables are inaccurate at least 80% of the time.)

3. *The Use of Gender-Based Tables Makes The Sterotypical Assumption That Women Do Not Work In The "Man's World"*

The government also attempts to assert that the gender-based discrimination here is not based on stereotyped or traditional assumptions. (Brief in Opp. at 7.) This is not so. The use of male/female tables perpetuates the traditional assumption that women do not work outside of the home, that women are not exposed to the pressures and vicissitudes of the workplace and that women do not engage in such "male customs" as smoking and drinking. (See Petition at 14-15 and materials cited there.)

The government quotes *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion) that the Supreme Court has upheld statutes that "realistically reflects

the fact that sexes are not similarly situated in certain circumstances." (See Brief in Opp. at 6.) *Michael M.* has no relevance here. That case involved a statute that made it a criminal offense for a male to have intercourse with a girl under the age of eighteen. This Court upheld that statute because "young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse." 450 U.S. at 471. The Court recognized the absolute biological difference between the sexes with respect to human reproduction. Clearly, the assumptions that go into the gender-based tables are not based on any such biological difference.

Finally, where there is no reason, as here, for the gender discrimination to exist, its invidiousness is clear.

4. *The Impact on Female Or Male Beneficiaries Is Irrelevant*

The government also argues that the Court of Appeals' finding of a "patchwork distribution of relative advantages and disadvantages" (A 15) was a correct basis for finding that the discrimination here is not unconstitutional. (Brief in Opp. at 7-8.) The estate tax statute at issue here is directed at decedents and it works to the detriment of female decedents solely because of their sex. The basic purpose of the federal estate tax is to tax the privilege of transferring property by testamentary disposition or *inter vivos* substitute. The statute, therefore, is not directed at beneficiaries and, in any event, any impact on such non-taxpayers "does not eliminate the valid complaint of all female settlors that their gender always results in a higher valuation of the reversionary interest than would occur if these settlors had been males." (Dissenting opinion of Judge Newman, A-37).

In addition, the Court of Appeals stated that this "patchwork distribution" did not put women under a greater aggregate tax burden. (A 15-A 16) The Court also inconsistently held, however, that "similarly situated men and women are treated differently in a way that may effect the taxpayer's ultimate tax burden." (A 8)

5. *The Use of Gender-Based Tables Is Not Compatible With Congressional Intent*

The government argues that the use of gender-based tables is compatible with Congress' intention that averages be used and again simply concludes that gender-based tables give more accurate averages. (Brief in Opp. at 8-9.) As already discussed, the use of male/females tables simply is not more accurate. Nobody disputes that Mrs. Wallace's true interest in the reversion is zero. Talk of a fictional interest based on male/female actuarial tables as being more accurate than a fictional interest based on unisex tables is absurd.

Furthermore, when Congress first enacted the statutory scheme, only unisex tables were used. Congress never authorized the IRS, nor could it, to use unconstitutional regulations to implement the legislation.

In fact, the Internal Revenue Service and the Courts have interpreted the statutory language to mean that the actuarial value is to be determined without regard to the particular facts that would normally be considered in valuing an interest dependent upon a life or lives. Rev. Rul. 66-307, 1966-2 C.B. 429; *Estate of Dwight B. Roy, Jr.*, 54 T.C. 1317 (1970); *Estate of Henrietta Allen v. United States*, 558 F.2d 14, 19 (Ct. Cl. 1977); *Robinson v. United States*, 454 F. Supp. 1160 (N.D. Cal. 1978), *aff'd*, 632 F.2d 822 (9th Cir. 1980). *Contra, Hall v. United States*, 353 F.2d 500 (7th Cir. 1965).

There is not a hint in the statute or the committee reports to suggest that Congress intended to authorize the Secretary to consider the particular fact of sex and no other particular fact, when determining "value" for purposes of the 5% test. Certainly, Congress ancitipated that the tables could be changed to reflect up-to-date mortality data and interest rates but there is no authority for differentiating between the sexes by the use of sex discriminating tables, rather than using the unisex table in existence at the time of the adoption of the 5% rule.

6. *The Government Ignores The Court Of Appeals' Holding That The Discrimination Must Be Intentional*

Significantly, the government ignores the Court of Appeals' holding that the discrimination must be intentional. (A-19) No such requirement exists (Petition at 22) and the government has recognized this by not even mentioning the Court of Appeals' holding on that issue.

7. *The Government's Argument On* Manhart *And* Norris *Is Unavailing*

The government argues that *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978) and *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) are inapplicable here because the effects of the challenged practice in those cases were different from the effects here. (Brief in Opp. at 9-10.) In *Manhart* and *Norris*, according to the government, those who did not fit the statistical norm were discriminated against but, in this case, because the decedent has died, she does not fit the statistical norm whether gender-based or non-gender-based tables are used. The government argues, therefore, that in the present situation, there is "no adverse effect on non-conforming individuals similar to that involved in *Norris* and *Manhart*." (Brief in Opp. at 10, fn. 10.) In this case, however, the tables discriminate against those who fit the statistical norms because every women is more likely to be taxed. (A 27, A 29) The discriminatory impact, therefore, is quite clear.

In *Manhart* and *Norris*, furthermore, the justification for the challenged scheme was that contributions had to be sufficiently matched with benefits to insure the solvency of the annuity. Such a justification does not exist in the case of valuing a reversionary interest.

In any event, the government's argument undercuts its conclusion that accuracy is an important governmental objective. As the government acknowledges, "the decedent's actual life expectancy is entirely irrelevant." (Brief in Opp. at 10.) Using gender

to determine a purportedly more accurate actual life expectancy when such "actual life expectancy is entirely irrelevant" cannot be an important governmental objective.

8. *The Government, By Its Unilateral Action Of Adopting New Regulations, Cannot Undercut The Rights of Petitioner That Have Already Been Asserted In Pending Litigation*

Although the government claims that the issue presented lacks continuing importance, this is not so. (Brief in Opp. at 11.) When the government has acted unconstitutionally towards a taxpayer, it cannot mitigate that unconstitutionality by saying "we won't do it again" or avoid its duty to rectify the wrong done to the taxpayer where, as here, the taxpayer has continually asserted her rights and where litigation involving those rights was pending. The government's position apparently is that it has the unilateral right to determine the issues presented here by its readoption of unisex tables. Allowing the government to do so would be exceedingly unfair to petitioner. Furthermore, without review by this Court, there is nothing to prevent the government from using gender-based tables again. Important questions involving taxation based on gender have been presented, therefore, and those questions should be reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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/s/

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